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Denial of Interest Under Pass Book Rules

Where a savings bank adopted in 1857 a by-law providing that deposits should not draw interest after expiration of 20 years from time of last deposit or draft, it was held that the charter provision protecting existing depositors against changes in regulations until personal notice did not apply to a person who became a depositor in 1864. Wharton v. Poughkeepsie Savings Bank et al., Supreme Court, 31 N. Y. Supp. (2d) 311.

In this case Robert K. Wharton opened an account in April, 1864, with defendant savings bank with an initial deposit of $275. No further deposits or withdrawals have been made since that date. The only evidence of the transaction is in the bank book which has continued to remain in the possession of the bank and a deposit register. An entry in this register, under date of April 9, 1864, shows the following: "Account number 7702; Depositor's name, Robert Wharton; Amount deposited, $275; Residence, U. S. Volunteer; Reference, Wm. S. Johnson, who came with him." No signature of the depositor is contained in the records of the bank.

Interest and dividends continued to be credited by the bank to Wharton's account until 1890. From time to time they were entered in the bank book up to July 1, 1890. There were never any deposits except those credited in the bank book by the bank and there were never any withdrawals. A copy of the by-laws was contained in the bank book which remained in the bank's possession.

An action was recently brought by the administrator of the depositor, against defendant bank and the Comptroller of the

NOTE — For similar decisions see Banking Law Journal Digest (Fifth Edition) §1360.

State of New York, to recover unpaid dividends alleged to amount to $6,920.33. It was held that the terms of the contract between defendant bank and depositor were the charter and the by-laws which were contained in the bank book which was issued on the opening of the bank account. Depositor, therefore, deposited all money in defendant bank subject to the charter of the bank, and the by-laws contained in the bank book. Consequently, defendant bank could discontinue the interest after 20 years, during which time no deposits were made. In its opinion, the court said:

A bank depositor is one who delivers to or leaves with a bank money subject to his order. Newmark, Bank Deposits § 12; Anheuser-Busch Brewing Ass'n v. Clayton, 5 Cir., 56 F. 759, 761. This definition assumes that the depositor at some time had the money in his possession. None of these dividends which were credited on the deposit book herein were ever in his hands or possession.

The bank was organized by a public act of the Legislature. Laws of 1831, chap. 134. Section 6 of said act provides as follows: "The said corporation shall receive as deposits all sums of money that may be offered for that purpose, in such sums and on such terms as are allowed by this act, for the purpose of being invested in any public stock, created under and by virtue of any law of the United States, or of the State of New York, or of any other of the United States, or of being loaned out upon bond and mortgage on real estate of double the value of the sum loaned; and such deposits shall be repaid to each depositor when required, at such times, and with such interest, and under such regulations as the board of managers shall from time to time prescribe; which regulations shall be put up in some public and conspicuous place in the room where the business of the said corporation shall be transacted, and shall not be altered so as to affect anyone who may have been a depositor previous to such alteration, until after personal notice thereof."

The by-law in question was adopted in 1857. It provided as follows:

"Article X. All accounts to which no deposit and on which no draft shall be made for twenty years in succession, shall be closed, and neither such deposits, nor the interest which shall have accrued thereon, shall draw any interest, after the expiration of twenty years from the time of the last deposit or draft.

"Article XI. The Trustees may at any time make such other regulations or alterations in those previously made, as may be deemed necessary, and shall be equally binding as those subscribed to, after the same shall be made known."

The plaintiff's intestate became a depositor in 1864. None of his pre-existing rights were affected by the by-laws of 1857. He had no rights at that time. The charter provision, protecting existing depositors against changes in the regulations, until personal notice, did not apply to him.

Necessarily, Wharton's rights and obligations under the deposit were defined by the charter of the bank and the by-laws in force at the time of his deposit. He knew that in making a deposit he was entering into contractual relations with the bank. The terms of the contract are the provisions of the charter and the by-laws. Ferguson v. Harlem Savings Bank, 43 Misc. 10, 86 N. Y. S. 825.

The appellant relies upon the case of May v. Union Dime Savings Bank, 243 App. Div. 815, 278 N. Y. S. 458, which is a memorandum decision and which holds that an entry in a pass book issued by the defendant to the plaintiff's testatrix, crediting accrued interest on the account to July 1, 1914, constitutes a deposit and renders the account active and entitles plaintiff to the accrued interest.

It is necessary to make an examination of the papers on appeal to understand the May case. In that case the bank book was in the possession of the depositor and was taken to the bank for the credit of interest. This was done several times and withdrawals were made so that the May case is not an authority for the reversal of the judgment in this case.

Under the terms of the contract, which are the charter and by-laws, the by-laws being contained in the bank book issued on the opening of the bank account and which remained in the custody of the bank, constituted the contract. The plaintiff's intestate is presumed to have known of the by-laws although the record fails to show that he signed them. They were contained in his book. Any money that he deposited in the bank he deposited subject to the by-laws and the charter of the bank.

The bank was clearly within its rights under its charter and the by-laws to discontinue interest on the account and the order and judgment appealed from should be affirmed, with costs.

HEFFERNAN, J. (dissenting)—I am convinced that this account did not become dormant until July 1, 1910, and that consequently plaintiff was entitled to summary judgment for $1,189.40. A similar question was involved in May v. Union Dime Savings Bank, 243 App. Div. 815, 278 N. Y. S. 458. The only distinction between the May case and the case before us is that in the May case the depositor himself presented the pass book and had the interest credited. Here the bank had possession of the pass book and actually credited the interest and dividends itself. A dividend entered on a pass book is just as much a deposit as if the depositor had actually drawn his dividends and immediately redeposited them with the bank.

Bank Directors Protected by Statute of Limitations

The directors of a national bank are not trustees of an express trust, with respect to the property or funds of the bank, but of an implied or resulting trust created by the operation of the law upon their official relation to the bank; and the statute of limitations and the doctrine of laches may be invoked in their defense, when sued for a breach of such trust. Such an action is maintainable either at law or in equity, and a court of equity will follow the statute of limitations, unless unusual or extraordinary circumstances render its application inequitable in a particular case. White v. Federal Deposit Insurance Corporation, United States Circuit Court of Appeals, Fourth Circuit, 122 Fed. Rep. (2d) 770.

In this case an action was brought by the Federal Deposit Insurance Corporation, Receiver of the Parksley National Bank, of Parksley, Virginia, against certain of the directors of that bank, to recover assets of the bank transferred to them and to recover a money judgment for moneys of the bank alleged to have been received by them, in large part as collections made on these assets.

The facts are that the bank was placed in the hands of a conservator following the bank holiday of 1933 and was reopened pursuant to a plan approved by the Comptroller of the Currency. The approved plan contained a provision for an unconditional cash contribution by shareholders, and a provision for elimination of certain items from the balance sheet. The assets charged off and eliminated from the balance sheet included notes and other securities of a face value of approximately $62,000 and an unpaid draft on another bank in the sum of $7,566.92. These were charged off at the time of the reopening of the bank. Collections were made on these charged-off assets from time to time aggregating a little in excess of $12,000, and were deposited by one of the directors in a special account which he maintained in his own name as

NOTE — For similar decisions see Banking Law Journal Digest (Fifth Edition) §§1117, 1401.

trustee and were immediately disbursed for the individual benefit of the directors, who claimed to be the rightful owners thereof.

The evidence shows without contradiction that all of the stockholders of the bank knew from the beginning that the defendants were claiming to be the owners of these charged-off assets, that there were fifteen stockholders of the bank other than the interested directors and that they owned 14 per cent of the bank's stock. There is evidence also that the fact that the directors were claiming these assets was well known from the beginning to the bank examiners who examined the bank for the Comptroller of the Currency and for the Federal Deposit Insurance Corporation, that a representative of the Reconstruction Finance Corporation referred to it in a letter of 1934 and that the Deputy Comptroller of the Currency referred to it in a letter in 1936. Suit was not instituted to recover the assets or to challenge the right of the defendants in same, however, until January 11, 1940.

It was held that, in accordance with the general rule, directors of a national bank are not "trustees" of an express trust, and may invoke the defense of the statute of limitations. Evidence was sufficient to show that the directors were claiming the assets adversely, to the knowledge of the independent stockholders and bank examiners, so as to start running of the five-year statute of limitations. In its opinion, the court said:

> We do not think that the running of the statute was stayed by the provision of section 5811 of the Code that "the right to recover money paid under fraud or mistake shall be deemed to accrue, both at law and in equity, at the time such fraud or mistake is discovered, or by the exercise of due diligence ought to have been discovered." Assuming, without deciding, that the diversion of assets constituted fraud in law or mistake within the meaning of this section (cf. Johnson v. Black, supra, 103 Va. 477, 49 S. E. at page 637), it is clear that same was discovered more than five years prior to the institution of suit. Of course notice to the directors who were responsible for the diversion could not be held discovery by or notice to the corporation; but there was more than this. There was actual knowledge on the part of all the stockholders, including fifteen independent stockholders owning fourteen per cent of the stock; and there was actual knowledge, also, on the part of the bank examiners representing

the Comptroller of the Currency and the Federal Deposit Insurance Corporation. There was no fraudulent concealment or other exceptional circumstance to prevent the running of the statute; but the assets were openly taken under claim of right and pursuant to an agreement which, while it could not affect the rights of the bank as fixed by the order of the Comptroller of the Currency, was thoroughly understood, not only by the other stockholders, but also by those whose duty it was to protect the interest of depositors and other creditors, including the examiners for the Federal Deposit Insurance Corporation, which, as a guarantor of the Bank's deposits, was most vitally concerned in the preservation of its assets.

Notice to all of the stockholders of a matter so intimately affecting their rights must be deemed notice to the corporation. Simmons Creek Coal Co. v. Doran, 142 U. S. 417, 436, 12 S. Ct. 239, 35 L. Ed. 1063. What we have here, however, is more than mere notice to the corporation. We have actual knowledge on the part of all the stockholders of the corporation who would be entitled to complain of the wrong, coupled with actual knowledge on the part of bank examiners whose duty it is to protect depositors and the public. Under such circumstances, we think that there is no escaping the conclusion that, within the meaning of the quoted provision of section 5811 of the Code, the fraud or mistake involved in the transfer of the assets was "discovered, or by the exercise of due diligence ought to have been discovered" so as to set the statute of limitations running.

In reaching this conclusion we have not taken account of the rather significant facts that the transfer of assets was shown by the minutes of a directors' meeting as early as 1934, that a representative of the Reconstruction Finance Corporation referred to it in a letter in 1934, that the Comptroller of the Currency complained of it in a letter in 1936, and that two independent members were elected to the Board of Directors, one of whom was chosen president, some time prior to the bank's failure. These facts, while significant, are not determinative. The entry in the minutes of the directors may not have been seen by any persons other than the directors, the Reconstruction Finance Corporation was only one of the creditors, and the letter from the Comptroller of the Currency and the election of the independent directors occurred within the five-year period preceding suit.

It is argued that the statute did not run in favor of the directors because, it is said, they controlled the corporation through a majority of stock ownership and control of the directorate and there was consequently no one to sue them. It is clear, however, that suit in behalf of the corporation could have been brought by any of the independent stockholders. Curtis v. Connly, 257 U. S. 260, 42 S. Ct. 100, 66 L. Ed. 222; Hughes v. Reed, 10 Cir., 46 F. 2d 435; McNair v. Burt, 5 Cir., 68 F. 2d 814, 815; Anderson v. Gailey, D. C., 33 F. 2d 589, 592;

Mobley v. Faircloth, 174 Ga. 808, 164 S. E. 195, 83 A. L. R. 1201, and note. In addition to this, there was ample power on the part of the public authorities who had knowledge of the situation to take action with respect thereto. The national bank examiners reported to the Comptroller of the Currency, who had "ample power to compel restitution, resignation, or a receivership." Hughes v. Reed, supra [46 F. 2d 442]; and the Federal Deposit Insurance Corporation was given ample power to protect itself and the public. 12 U. S. C. A. § 264.

We do not hold that knowledge of a single stockholder or of a bank examiner would be imputed to the bank, nor that the right of such stockholder or the banking authorities to seek a remedy would, of itself, set the statute of limitations running. What we do hold is that knowledge of all the stockholders is knowledge of the bank and that where these and the banking authorities have such knowledge and have power under the law to institute suit or take other action to remedy the situation, the statute of limitations is set in motion. In other words, there is no reason why the running of the statute with respect to a diversion of assets should be suspended when all parties affected thereby have knowledge thereof and full power under the law to pursue a remedy.

We do not think that the reports to the Comptroller, to the effect that the $50,000 contributed to the capital fund of the bank was a "voluntary contribution," was sufficient to show that the claim of the directors to the charged-off assets was not adverse or to deny them the benefit of the statute. The evidence shows beyond question that they were claiming the assets adversely, to the knowledge of the independent stockholders and the bank examiners, and it is clear that they did not fully appreciate the meaning of "voluntary contribution." Nothing is shown to have been said by them with respect to the charged-off assets inconsistent with their adverse claim thereto.

It is argued that the statute of limitations does not protect the directors because they profited personally from the diversion of assets. We think there is no basis for such a distinction. It is true, of course, that the personal interest of a director adverse to that of the corporation will prevent notice to him being deemed notice to the corporation; but, as indicated above, notice to the corporation here is not dependent upon notice to the interested directors, but is based upon notice to all the stockholders, including those who did not profit by the diversion. We know of no authority supporting the proposition that, in such case, the directors are to be denied the benefit of the statute because they profited by the diversion. The case of Anderson v. Gailey, D. C., 33 F. 2d 589, relied on by plaintiff, does not so hold. There the case was retained as to transactions between the directors and the bank so that these might be more closely inquired into, presumably for the purpose of determining whether there was such con-

cealment with regard thereto as would prevent the running of the statute. On the other hand, the statute has been expressly held to apply in cases where the directors benefited from the diversion. Cooper v. Hill, supra; Farmer v. Standeven, supra. And this holding necessarily follows from the holding that directors are not trustees of an express trust. The property passing into their hands by such diversion is not property as to which they sustain a trust relationship, which would prevent the running of the statute; and there is no basis for holding that the statute does not run with respect to the wrong done the corporation. It is true, of course, that the receipt by them of assets of the bank would give rise to a constructive trust; but, as above pointed out, it is well settled in Virginia that the statute of limitations runs against the establishment of constructive trusts.

Signature of Maker Inadvertently Placed in Inverted Position

Where it is manifest on the face of an instrument that the maker intended to sign at the end of the instrument but mistakenly or inadvertently signed at another place, the signature will be deemed to have been affixed at the end of the instrument as required by statute. Zimmerman v. Segal, Court of Appeals of Kentucky, 155 S. W. Rep. (2d) 20.

In this case A. Segal executed two notes on the same date, one payable to Hannah Segal in the amount of $1,000 (about which no complaint is made), the other payable to George Segal in the sum of $1,100. It is admitted that both signatures are genuine. The $1,100 note was signed by the maker in the upper left-hand corner, the signature being upside down in respect to the other writing on the paper. However, it is in the exact position that the signature of the maker would have been placed had the instrument been presented to him in an inverted position without his discovery of that fact.

The notes were executed on a printed form and with the exception of the amount and payee are identical. The printed portion of the note as well as the blanks filled with pen and ink are enclosed within a printed border consisting of three

NOTE — For similar decisions see Banking Law Journal Digest (Fifth Edition) §1369.

lines. Mr. Segal's signature is substantially within this printed border which likewise encloses all other pen and ink insertions material to the contract. There is no writing in the note other than that which was necessary to fill the blank spaces except "interest at 6 per cent" which was the rate which would have prevailed had it not been inserted.

In holding that the signature would be deemed to have been affixed at the end of the note as required by statute, the court said: "Since both notes were executed at the same time and were so identical in the respects mentioned and since the signature affixed in the upper left-hand corner was upside down in respect to the other writing on the paper and was within the border of the printed form, it is apparent that at the time it was executed the $1,000 note was placed over on top of the $1,100 note for the convenience of the maker. We cannot escape the conclusion that this was the reason the inverted position of the paper was not noticed by the maker; and we are of the further opinion that the signature was intended to be placed in the lower right-hand corner at the end of the instrument."

In its opinion, the court wrote:

> The common law rule in respect to the signing of notes is that the name of the maker is usually subscribed at the bottom of the note, but if his name is subscribed elsewhere in the body of the note so that it clearly appears that he is the maker, such signature will be sufficient. 7 Am. Jur. section 202, page 904; 10 C. J. S., Bills and Notes, § 37, p. 460. That rule prevails in many jurisdictions today. Indeed it prevails in Kentucky unless section 468 of the Statutes changes the rule. That section reads: "When the law requires any writing to be signed by a party thereto, it shall not be deemed to be signed unless the signature be subscribed at the end or close of such writing."
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> The legislative intent in enacting section 468, supra, is obvious. A signature placed at the end of the writing clearly shows that all the matter above the signature expresses all which the signer wished to authenticate and that nothing has been appended to the writing which the signer did not wish to authenticate or by which he did not intend to be bound. Gentry's Guardian v. Gentry, 219 Ky. 569, 293 S. W. 1094. But it was never intended by the Legislature that the rule expressed in the Statutes should be used to invalidate a promissory note, to which it is obvious nothing has been appended, and where the note clearly manifests on its face that the signer of the instrument intended

to affix his signature at the close or end of the writing, although, by inadvertence or mistake he actually affixed it at some other place. We are of the opinion that where it is manifest on the face of the instrument, as it is in this case, that the maker intended to sign at the end of the instrument, but mistakenly or inadvertently signed at another place, the signature will be deemed to have been affixed at the end of the instrument within the meaning of the Statute.

Deposit Account in Trust

Without more than knowledge of an account in bank in name of father in trust for his son, bank would be justified in regarding the trust as tentative with no obligation upon it to inquire into the trustee's right to withdraw, or into the uses to which the withdrawals were put. Downey v. Duquesne City Bank, Superior Court of Pennsylvania, 22 Atl. Rep. (2d) 124.

In this case a savings account was opened with defendant bank in the name of plaintiff, then a young child, by his father as trustee. From time to time additional deposits were made, which with interest credits amounted to a total of $1,120.37. The whole of this amount was withdrawn by the father and paid to defendant bank to apply on his personal obligations to it. The bank accepted the proceeds of withdrawals from the account with full knowledge that the father was treating the fund as his own.

When the son became of age he sued the bank for the money, alleging that the relationship was one of irrevocable trust and that the bank was a party to a fraudulent misappropriation of the fund. He further alleged that the money deposited was derived from gifts from relatives and friends and intended to be for the sole use and to be the property of the son.

It was held that the son's allegations were not sufficient to state a cause of action and to impose liability on the bank for withdrawals by the father. The fact that the funds deposited were not the father's money was not enough but, if the bank had knowledge that the deposits belonged to the son upon an irrevocable trust, it became liable if it knowingly applied the

NOTE — For similar decisions see Banking Law Journal Digest (Fifth Edition) §424.

proceeds of the deposits to the individual debt of the father. In its opinion, the court wrote:

It was formerly the rule that money deposited to the credit of a person as trustee for another, prima facie, belonged to that other and the burden was on the party claiming it to disprove such title. Arnold v. Macungie Savings Bank, 71 Pa. 287; Gaffney's Estate, 146 Pa. 49, 23 A. 163. But the intention of the parties was controlling and a purpose other than creating a trust might be shown by the circumstance that the depositor exercised complete dominion over the fund and made frequent deposits and withdrawals in "a multitude of financial transactions": Rambo v. Pile, 220 Pa. 235, 69 A. 807, 808. More recently, again recognizing that deposits may be made by one, nominally as trustee for another, but in reality for purposes other than upon a trust, it is the general rule that whether a trust is tentative or irrevocable, or whether any trust is in fact created depends upon the intention of the parties. Restatement, Trusts, § 58. The doctrine of tentative trusts has found full expression in Scanlon's Estate, 313 Pa. 424, 169 A. 106, 108, as follows: "A deposit by one person of his own money in his own name as trustee for another, standing alone, does not establish an irrevocable trust during the lifetime of the depositor. It is a tentative trust merely, revocable at will, until the depositor dies or completes the gift in his lifetime by some unequivocal act or declaration, such as delivery of the pass book or notice to the beneficiary." This doctrine has been amplified in such later decisions as Pozzuto's Estate, 124 Pa. Super. 93, 188 A. 209, and in Bearinger's Estate, 336 Pa. 253, 9 A. 2d 342.

In the proffered amendment, plaintiff averred that "defendant bank at the time of receiving such monies, through its proper officers and agents, had been advised of and had full knowledge of the arrangement and conditions under which said trust account had been opened, the purposes of the same and the sources from which the monies deposited in said account had been derived," *i.e.*, from relatives and friends, and that the deposits were "intended to be for the sole use, benefit, and advantage of, and to be the property of" plaintiff. Though the averment of notice to defendant might be more specific, the averments of the statement so amended, if proved, will support recovery against the bank. It is well settled that if a bank has notice that a fiduciary intends to misappropriate trust funds on deposit to his own use, the bank becomes liable for the misappropriations; by allowing the withdrawals, the bank becomes a party to the fraud by failing to prevent its accomplishment. This is particularly so if, as charged in this case, the bank accepts the fruits of the misappropriation and applies them to the personal obligation of the fiduciary. 7 Am. Jur., Banks, § 521. Under the Uniform Fiduciaries Act of May 31, 1923, P. L. 468, § 7, 20 P. S.

§ 3391, the bank is liable if it "pays the check with actual knowledge that the fiduciary is committing a breach of his obligation as fiduciary in drawing the check or with knowledge of such facts that its action in paying the check amounts to bad faith." Sections 8 and 9 of the act are of like import, 20 P. S. §§ 3392, 3393. See Davis, Trustee v. Pennsylvania Co., 337 Pa. 456, 12 A. 2d 66.

Signature of Indorsement by Unauthorized Agent of Depositor

A bank cannot establish a custom and confer apparent authority upon an unauthorized agent by recognizing the unauthorized agent's acts over a period of time and then rely upon this custom as conferring apparent authority in the absence of knowledge of the custom to the principal. The doctrine of apparent authority is based upon an estoppel of the principal, and it is the principal's conduct and not the bank's that raises the estoppel. The bank cannot rely upon its own negligence of which the customer is ignorant as the basis of an estoppel against the customer. Industrial Plumbing & Heating Supply Co. v. Carter County Bank, Court of Appeals of Tennessee, 154 S. W. Rep. (2d) 432.

In this case plaintiff company opened a deposit account with a Tennessee bank and filed with the bank the signature of its manager as the only authorized signature on the account. From time to time, however, plaintiff's bookkeeper would draw small checks upon the company's account and thus withdraw small amounts to be used in change. The bank permitted this by recognizing his signature, but it was not established that the plaintiff, as represented by the manager who had authority by reason of the identification card to withdraw the funds, knew anything of this practice.

Also, in the operation of the account, it had been the custom for the bookkeeper to countersign all checks received by the company, using the stamp "For Deposit," but he had no authority, based upon the agreement between the bank and the company, as evidenced by the card, to countersign the checks or

NOTE — For similar decisions see Banking Law Journal Digest (Fifth Edition) §§56, 412.

indorse by countersigning and withdraw the funds. On one occasion the bookkeeper drew a check on the plaintiff's account, cashed it at the bank and converted the money to his own use.

It was held that the plaintiff was not "estopped" to recover the amount of such check from the bank. Plaintiff did not clothe the bookkeeper as its agent with apparent title to the check and the bank did not act and part with value on the face of such agent's apparent ownership of the check on authority to make indorsement and therefore was not justified in trusting to appearances. In its opinion the court said:

The applicable rule is stated in the case of Tellico Bank & Trust Company v. Loomis, 147 Tenn. 158-163, 246 S. W. 21, 23, as follows: "'Two things must occur to create an estoppel by which an owner may be deprived of his property, by the act of a third person, without his assent, under the rule now considered; (1) The owner must clothe a person assuming to dispose of the property with the apparent title to, or authority to dispose of it; and (2) the person alleging the estoppel must have acted and parted with value upon the face of such apparent ownership or authority; so that he will be the loser if the appearances to which he trusted are not real.' Barnard v. Campbell, 55 N. Y. 456, 14 Am. Rep. 289."

Under the first head of the rule (1) the owner did not clothe the agent with apparent title; the bank had in its possession the card designating the person who had authority to make the endorsement, and under the second head (2) the bank did not act and part with value upon the face of such apparent ownership or authority, and it did not act upon appearances to which it trusted, it was not justified in trusting to appearances, disregarding the express direction contained in the card, required by it, for its protection and the protection of the depositor. The card did not afford protection to the bank alone, and give no protection to the customer. The customer had a right to rely upon the bank's following and carrying out the instructions given upon the card which it had required. The bank was not justified in disregarding the express instructions contained upon the card and acting upon appearances. Nor upon its own past conduct in violating the instructions, because the principal had no notice of this violation. It must create an estoppel acting upon the conduct of the principal and not the conduct of the unauthorized agent and itself.

The appellate relies upon and cites 6 Michies' Tenn. Dig. 485, and not the case digested, as follows: "Rule Applies to Clothing Agent with Apparent Authority.—The doctrine of estoppel prevents the real owner of property from recovering, when he has delivered it to an

agent clothed with all the indicia of ownership and power of disposition, which the agent used to another's prejudice."

The endorsement by stamp of the company's name without the signature of T. T. Hughes did not clothe the unauthorized agent with the indicia of ownership, and the bank knew this because it was authorized to recognize only the countersignature of T. T. Hughes, and for this reason the unauthorized agent could not use the endorsement to the bank's prejudice.

The Restatement of Agency defines apparent authority as: "The power of an agent to effect the legal relations of an apparent principal with respect to a third person by acts done in accordance with such principal's manifestation and consent to such third person that such agent shall act as his agent." Restatement, Agency (1933) Section 8.

In this case the principal made no manifestation of consent upon which the bank could have acted and been misled. In fact, the check was paid by a teller who had been in the bank but a short time, and he does not testify that he acted upon any manifestation, or any course of conduct between the bank and the agent known to him, but the truth is he paid the check, assuming the agent had authority to countersign it, and without investigating the authority to sign the company's name, which authority was available in the records of the bank. If in doubt, the bank could have protected itself against loss by consulting its records. Where one of two innocent persons must suffer, he whose negligence causes the loss must bear it. The bank was negligent in not ascertaining the agent's authority to endorse the check, when the evidence of authority was available in the bank's records, and the customer relying upon the express authority given was guilty of no negligence, being ignorant of the practice of the bank cashing checks for this unauthorized agent.

It is insisted that this card had authority only in reference to the withdrawal of funds deposited in the name of the company, and had no reference to endorsements to checks made in favor of the company. The card was executed conferring authority to protect the bank and the customer in all transactions requiring the signature of an agent in the transaction of business. It is as important to the bank to protect itself against the unauthorized signature of an agent in the endorsement of a check as in the drawing of a check, and the purpose was to protect both the bank and the depositor in every transaction between them requiring an agent's signature.

When the agent withdrew and appropriated the money, the burden was not upon the plaintiff to trace the money further and show by the proof that the agent did not place the money in the register of the company and then withdraw it. The bank in wrongfully cashing the check caused the loss. The plaintiff is entitled to recovered. The judgment of the lower court is reversed and a judgment rendered with costs.

BANKING DECISIONS

In this department are published each month all of the important decisions of the Federal and State Courts, involving questions pertaining to the law of banking and negotiable instruments.

BANK'S RIGHT OF SET-OFF AGAINST CLAIM

Haefner v. First National Bank of Elmwood Place, Court of Appeals of Ohio, 36 N. E. Rep. (2d) 308

An action was brought by the administrator of a deceased depositor's estate against an Ohio bank to recover money which the decedent had on deposit at the time of his death. The bank set up in defense a claim against the deceased which it acquired from a third party. It was held that under the Ohio statute the bank could set-off against administrator's claim a contractual obligation of administrator's decedent, notwithstanding that the contractual obligation was acquired by bank after commencement of action by administrator.

The common-law rule, however, and the rule in states not having a statute similar to that of Ohio is to the contrary.

In 24 Ruling Case Law, 833, Section 39, it is stated: "Ownership at the time suit is brought is of the very essence of set-off, and a set-off or counterclaim must not only be in existence, but in existence in favor of the defendant interposing it, and at the time the action against him was commenced; he cannot purchase it afterwards, and then set it up. It is not sufficient that it was contracted for before but not transferred to the defendant till after suit brought. To permit a claim existing before but acquired after the action had been commenced to be interposed as a counterclaim would be a departure from the rule by which actions are to be determined according to the rights of the parties as they existed at the time they are commenced. It would also encourage barratry, a practice which receives no favor from the courts. The law never intended to permit a defendant, after an action had been commenced against him, to buy up, for purposes of litigation and defense, doubtful or other claims against the plaintiff, and then interpose them to defeat in whole or in part a demand against which the defendant had no defense at the time the suit was brought. The statutes in regard to set-offs and counterclaims were intended as a shield to protect defendants from being required to pay more than the amount actually owing by

NOTE — For similar decisions see Banking Law Journal Digest (Fifth Edition) §771.

them over and above all counterclaims and set-offs existing at the time suit was brought, without requiring them to institute cross actions for the recovery of their demands. It was also intended to prevent multiplicity of suits, and to prevent, not encourage, litigation."

Action by one Haefner, administrator, against the First National Bank of Elmwood Place, to recover money deposited in the bank, wherein the defendant filed a cross-petition. From a judgment for the plaintiff upon the pleadings and opening statement of counsel, the defendant appeals on questions of law.—[Editorial Statement.]

Reversed and remanded.

Stanley Silversteen, of Cincinnati, for appellant.

Chester S. Durr, of Cincinnati, for appellee.

ROSS, J.—This is an appeal on questions of law from a judgment of the Court of Common Pleas of Hamilton county. The court rendered judgment for the plaintiff upon the pleadings and opening statement of counsel.

There is no bill of exceptions, but the court in its judgment, properly journalized, states:

At the close of defendant's opening statement in the trial of this cause, the court, having instructed the jury to return a verdict against the defendant upon said defendant's cross-petition, for the reason that said defendant, as assignee, acquired said claim. the subject of its cross-petition, subsequent to the filing of the petition herein; and, upon the conclusion of the evidence, the court having instructed the jury to find for the plaintiff upon the petition herein, and the jury having rendered their verdict in accordance with said instructions. . . ."

The plaintiff, appellee herein, claims this court may not consider the claims of error advanced by the defendant, because of the absence of a bill of exceptions. The recital in the judgment entry meets this claim of the plaintiff. If the court was in error in its conclusion namely that the claim of the defendant advanced in its cross-petition as a set-off must have been acquired by the defendant prior to the filing of the petition by the plaintiff, as stated in the court's judgment entry as the ground of its action in rendering judgment for the plaintiff, then such judgment must be reversed.

It is true that the recital in the journal entry also states, "upon the conclusion of the evidence," and that this court is unaware of what evidence was introduced. However, again, the recital of the court is that the sole ground for its action in instructing a verdict for the plaintiff was that the cross-claim was not held by the defendant at the time the plaintiff filed his petition.

An easy way to avoid meeting the serious question thus presented by the action of the trial court would be to state that there might have been

evidence justifying the action of the trial court, although it was in error in the ground stated. In other words, the trial court in its judgment may have been correct, although for a reason other than that given.

Such action by this court would be in effect an evasion of the real question which may be fairly considered to have been presented.

The pleadings show that the plaintiff instituted an action as administrator to recover from the defendant bank a sum of money which had been deposited with the bank and for which it refused to account to the administrator.

The relationship of depositor and bank under such circumstances is that of debtor and creditor. Cleveland Trust Co. v. Scobie, Adm'r, 114 Ohio St. 241, 247, 151 N. E. 373, 48 A. L. R. 182.

The action to recover the amount of the deposit was an action in contract and under the provisions of Section 11319, General Code, the defendant had a right to advance a set-off against such claim of the plaintiff in contract. The requirements under this section are that the main action instituted by the plaintiff must be in contract and the cross-claim of the defendant also in contract. It is not necessary, as under Section 11317, General Code, referring to counterclaim, permitting either tort or contractual cross-claims, that the cross-claim refer to the same transaction or involve the same subject-matter of action.

Now in the answer and cross-petition of the defendant it appears that it acquired some sort of a cross-claim against the plaintiff.

It is stated that the defendant is the owner of such claim which was sold to it upon a date subsequent to the date upon which the petition was filed. It is also alleged that such claim was presented to the administrator for payment. It is true that it does not appear whether such claim is based upon contract or tort, but in considering this attack upon the pleading and the statement of counsel made in conformity thereto, every reasonable intendment must be given the pleading. The same situation prevails as upon a demurrer, in fact, the action upon the motion is in effect a demurrer to the pleadings and to the statement of counsel, and the same result is reached as upon demurrer to the petition, at least as far as construing the pleadings is concerned. See Guardian Life Ins. Co. of America v. Veser, 128 Ohio. St. 200, 190 N. E. 405.

Although the cross-petition (to which no demurrer was filed or motion addressed) does not define the cross-claim as being in contract, extending to the pleader the benefit of the doubt, it may be so considered.

A reply merely denied the new facts alleged.

There is therefore squarely presented for consideration the question which the trial court decided in favor of the plaintiff. That question involves the right of the defendant to cross-claim in an action in contract, setting up as the basis for such cross-claim a contractual obliga-

tion of the plaintiff's decedent acquired by the defendant after the action was commenced by the plaintiff.

There is no question but that if the defendant had acquired a valid claim against the decedent's estate, it could have made such claim the basis of a separate action and, if such claim was properly substantiated by proof or otherwise, obtained a "several judgment" against this plaintiff. Section 11315, General Code, provides:

"The defendant may set forth in his answer as many grounds of defense, counterclaim and set-off as he may have, whether such as heretofore have been denominated legal or equitable, or both. But the several defenses must be consistent with each other, and each much refer in an intelligible manner to the cause of action which it is intended to answer."

Section 11319, General Code, reads: "A set-off is a cause of action existing in favor of a defendant against a plaintiff between whom a several judgment might be had in the action, and arising on contract or ascertained by the decision of a court. It can be pleaded only in an action founded on contract."

Certainly, the defendant had the set-off at the time it filed its cross-petition. This statute, Section 11315, General Code, does not qualify the time when the defendant is permitted to "have" the set-off. The statute states that the defendant may set up any set-off he may have. When? When he seeks to assert it by cross-petition.

The common-law rule and the rule in states not having a statute similar to that of Ohio is to the contrary.

However, the rule in states where the rule is modified is illustrated in the case of Hoover-Dimeling Lumber Co. v. Neill, 77 W. Va. 470, 87 S. E. 855, 11 A. L. R. 575. The first paragraph of the syllabus in that case is as follows:

"In an action for a debt, defendant may at the trial offer and have allowed against such debt any payment or set-off which is so described in his plea or in his account filed therewith before the trial as to give notice of its nature, whether he acquired the account before or since the commencement of the action."

Stowe, Rec'r, v. First National Bank of Hamilton, 1 Ohio Cir. Ct. R. 524, 1 O. C. D. 292, and Johnson, Adm'r, v. Spiegel, 4 Ohio Cir. Ct. R. 388, 2 O. C. D. 612, are cited in support of the claim that Ohio has followed the general rule in spite of the Ohio statutes. These authorities are neither applicable nor controlling.

Some question has been raised as to the representative character of the plaintiff, and as to the fact that insolvency of the estate might result in a preference to the creditor-defendant. No such question is here presented by the pleadings or record. As stated before, the defendant could have obtained a "several judgment" against this plaintiff in an

independent action. This is one of the tests of a set-off. If in an independent proceeding such judgment could have been obtained upon an assigned claim (against which all rights of the plaintiff and his decedent are preserved by Section 11321, General Code), it is difficult to see why under the statutes noted the defendant may not advance any proper set-off he may "have" at the time he files his cross-petition.

It is obvious also, that there is not here involved or considered a situation where the defendant seeks to augment a claim defective at the time it is advanced in the defendant's original pleading. That this can not be done is beyond question. The plaintiff has the same handicap. In the annotation in 125 A. L. R. 612, at p. 613, it is stated:

"The rule supported by the overwhelmig weight of authority appears to be that if a plaintiff or defendant has no valid and subsisting title or right to the subject of his action or counterclaim at the time of its commencement, he may not by the subsequent acquisition, or perfection of such right or title, remedy the defect so as to succeed in the action."

The trial court erred in depriving the defendant of the right to present its acquired claim. If it is a valid set-off, it has such right, regardless of when it acquired the claim providing it had it when it filed its cross-petition.

The judgment of the trial court should be reversed and the cause remanded for further proceedings in accordance with law.

MATTHEWS, P. J. (concurring).—I see no reason for denying a defendant the right to defeat a plaintiff's action by any defense, set-off, or counterclaim which he may have at the time of trial and which he has brought into the case by a proper pleading. Nor do I see any reason for not applying this to an action by an administrator or executor upon a cause of action in favor of the decedent, provided it can be done without disturbing the order of distribution of the decedent's estate among his creditors as provided by the statutes.

In 21 American Jurisprudence, 899, Section 934, it is said:

"A creditor who, after the testator's death, receives money of the estate belonging to the executor or administrator is not entitled to a set-off for a debt due him from the decedent. Want of mutuality is generally relied on as a ground for denying the right of set-off in such cases. . . . Where, by reason of the special character of an asserted set-off, it appears that in no particular can the rights of any party interested in the assets of the estate be affected by its allowance or where the estate is solvent and able to pay all claims against it, including the allowed claim of a defendant asserting it as a set-off, the courts in the first instance do not, and in the latter should not, apply the strict rule of mutuality to prevent the allowance of the set-off."

In People ex rel. Webb, Aty. Genl., v. California Safe Deposit & Trust Co., 168 Cal. 241, 141 P. 1181, L. R. A. 1915A, 299, the court allowed a set-off where it appeared that the estate was solvent, and for

that reason there could be no disturbance of the statutory order of distribution among creditors. The authorities are collected in an annotation to that case.

As the judgment is reversed and the cause remanded for further proceedings, if the allowance of this set-off would enable the defendant as assignee to get an advantage in the distribution of this estate to which it would otherwise not have been entitled, that fact may be pleaded and proven.

HAMILTON, J. (dissenting).—The opinion in this case is based upon the construction given by the writer to Section 11319, General Code. Under the construction given, a set-off, not withstanding it was acquired subsequently to the filing of the petition, could be set off by cross-petition against plaintiff's claim. It is conceded that under the common law, and in the absence of statute, this could not be done. The rule at common law is stated in 24 Ruling Case Law, 833, Section 39, and is quoted in the opinion.

Therefore, if Section 11319, General Code, gives the right to assert a subsequently acquired set-off by the defendant, the statute would give added rights not present at common law and which should be specified, and lacking such specifications, this section should be strictly construed.

This section of the Code provides: "A set-off is a cause of action existing in favor of a defendant against a plaintiff. . . ." I am of opinion that the word "existing," means in existence at the time the plaintiff files his petition. The statute, thus construed, is entirely consistent with the common-law rule, and does not enlarge or extend the defendant's right to plead a subsequently acquired set-off in the plaintiff's action.

IRREVOCABLE LETTER OF CREDIT

Ornstein v. Hickerson, United States District Court, E. D. Louisiana, 40 Fed. Supp. 305

An irrevocable letter of credit in favor of a buyer of coffee was issued by bank which accepted 90-day draft by seller for purchase price of coffee as provided by sales contract. It was held that bank's liability to seller became absolute and buyer was not liable to seller for purchase price because draft was subsequently dishonored by bank which failed to open after bank holiday.

Action by Hugo Ornstein, operating and doing business under the name of Ornstein & Company, against William H. Hickerson, doing

NOTE—For similar decisions see Banking Law Journal Digest (Fifth Edition) §766.

business under the trade name of Hickerson Importing Company, for amount allegedly due under written contract for purchase and sale of 500 bags of coffee, which action was prosecuted for Dora Ornstein, wife of Adolf Gottlieb, after the death of the original plaintiff.

Judgment for defendant in accordance with opinion.

Henican & Carriere and C. Ellis Henican, all of New Orleans, La., for plaintiff.

Racivitch & Hickerson and Robert L. Hickerson, all of New Orleans, La., for defendant.

CAILLOUET, D. J.—This suit was originally brought on May 11, 1933, by Hugo Ornestein, lately operating and doing business as a coffee exporter under the name Ornstein & Company, out of Rio Janeiro, United States of Brazil, but he having died in the meanwhile and Dora Ornstein, wife of Adolf Gottlieb, having been judicially recognized as his "sole and universal heir," in keeping with the terms of his last will and testament, the proceedings have been carried through trial for and in her interest.

The defendant William H. Hickerson, Jr., domiciled and doing business in New Orleans, in this Eastern District of Louisiana, under the name of Hickerson Importing Company, is sued for $4,783, with legal interest thereon from judicial demand until paid, and costs, alleged to be due and owing under a written contract (there being no dispute between the parties as to its existence) signed L. C. Fallon & Co., agents of the seller, and accepted by Hickerson Importing Company as buyer, which read, in pertinent part, as follows:

"New Orleans, Nov. 17th, 1932.

"Sold for account of Messrs. Ornstein & Co., Rio de Janeiro

To Messrs. Hickerson Importing Co., New Orleans about Five hundred.....(500) bags of Victoria.....Coffee shipped or to be shipped to New Orleans within a month.....(Name of vessel to be given as soon as known) . . . Reimbursement by ninety-day sight drafts on New York under credit of Interstate Trust & Banking Co., New Orleans. L/C for about $4800.00. . . ."

The defendant first filed exceptions of no right or cause of action and of vagueness, which were overruled in due course.

In the answer which was subsequently filed, with reservation of the benefits of said exceptions, defendant first pleads that by the terms of the contract in question ". . . it was specifically stipulated that reimbursement (or payment) for said coffee to plaintiff was to be made by ninety-day sight drafts on New York under credit of Interstate Trust & Banking Company, which was fully complied with by defendant delivering to plaintiff letter of credit No. 3203 of said Bank in plaintiff's favor, under which plaintiff drew a draft on said Bank for the purchase price of said coffee, which draft was duly accepted upon presentation by the

Interstate Trust & Banking Company, but defendant denies that this coffee was shipped to him, and denies that he received this coffee from plaintiff, all as is more fully set forth and explained hereinafter."

The answer thereafter continues to the effect that the said letter of credit, which was for $4,783.00 and dated December 14, 1932, was forwarded by defendant to plaintiff's agents "in full payment and settlement of its obligation to plaintiff under the contract to purchase"; that the coffee purchased was shipped and consigned to the order of the Interstate Trust & Banking Company, with original documents covering such shipment via S.S. Taubate, consisting of a commercial invoice, a consular invoice, and a complete set of clear negotiable "on board ocean bill of ladings," accompanying a 90-day sight draft for $4,783 for the price, duly forwarded to and received by said bank, which, so the pleader contends "was irrevocably obligated to pay the purchase price thereof as the debtor of plaintiff, and as the holder of said negotiable documents representing the ownership of said coffee"; that such draft was to be charged against the irrevocable credit established to plaintiff's account "as evidenced by the said letter of credit No. 3203"; that the coffee in question was so received by the Interstate Trust & Banking Company only in view of the bank's acceptance of the ninety-day sight draft for payment on April 7, 1933, at the National City Bank of New York; that said coffee was thereupon delivered to defendant by the bank, under the terms and conditions of a trust receipt, a copy whereof defendant attaches to and makes part of the answer; and that said coffee was sold in due course by defendant and out of the proceeds of sale the bank was, on February 2, 1933, fully paid defendant's obligation unto it "for said letter of credit," so issued to Ornstein & Company, as evidenced by defendant's cancelled check which is also attached to and made part of such answer.

On April 7, 1933, when the Interstate Trust & Banking Company was then functioning only on a restricted basis (as it was, until finally closed and placed in liquidation by the Louisiana State Bank Commissioner) the ninety-day sight draft for $4,783 that the bank had accepted for payment on that date, at the National City Bank of New York, and that Ornstein & Company had disposed of through its regular banking channels in Brazil, was duly presented for payment in New York, but payment was refused and protest followed. The dishonored draft was then presented for payment to the acceptor bank at its main office in New Orleans, with demand made for full payment of the instrument, with no better success.

The evidence is quite clear that the plaintiff had sold coffee to Hickerson Importing Company, through L. C. Fallon & Company, brokers, on other occasions. The first one of such sales was on May 19, 1932, and the sale of November 17, 1933, now in issue, was the twelfth one. Every one of such purchases involved the use of Interstate Trust &

Banking Company letters of credit. During the bank holiday which followed the making of the contract of November 17, 1932, Hickerson Importing Company bought coffee from Ornstein & Company, through the same brokers, at least once more but then there was, naturally, no longer question of a bank letter of credit because of the times, and the seller drew a sight draft on the buyer for the sale price.

Mr. Paul O. Fallon, who according to his testimony, is sole active operator of the business of L. C. Fallon & Company, testified that he personally attended to the sale of the 500 bags of coffee to Hickerson Importing Company on November 17, 1932, and that he forthwith cabled his principal upon the signing of the contract.

Neither he nor Ornstein & Company, he says, designated the Interstate Trust & Banking Company as the bank for the furnishing of the required letter of credit, but he did ask the buyer what bank would furnish such letter of credit and apparently both he and Ornstein & Company were entirely satisfied to have it be the Interstate Trust and Banking Company, which, according to Fallon, had issued each one of the previous eleven letters of credit connected with the other purchases of coffee made of Ornstein & Company by said Hickerson Importing Company, as aforesaid; and upon and against which bank, ninety-day sight drafts had been drawn with the result that they had all been accepted and subsequently paid in due course.

Furthermore Mr. Fallon testified that the right was reserved to the seller to disapprove of the bank, and it is reasonable to suppose that the coffee in question would not have been sold or shipped but for the fact that the method and manner of reimbursement or payment made use of was entirely satisfactory to and approved by both Ornstein & Company and its agent effecting the sale.

By the cablegram to Ornstein & Company, the brokers notified their principal as follows: "Draw at ninety days on Interstate Trust & Savings Bank, send all documents to Interstate, and to their order."

It may be here noted that the bank so referred to in the cablegram was the same as the Interstate Trust & Banking Company mentioned in the contract of sale; the "Savings" in the bank title, having been changed to "Banking."

Whilst the coffee was sold to be shipped to New Orleans "within a month" from November 17, 1932, and whilst shipment did take place on December 11th from Victoria, Brazil, the required letter of credit was not issued by the Interstate Trust & Banking Company until December 14th, when the L. C. 3203 for $4,783, addressed to Ornstein & Company, was furnished to L. C. Fallon & Company by Hickerson Importing Company. This instrument read in part as follows:

"We hereby establish our irrevocable letter of credit in your favor for the account of Hickerson Importing Co., New Orleans, La., for any

sum or sums not exceeding a total of Four Thousand Seven Hundred Eighty Three and 00/100 Dollars available by your drafts on Interstate Trust & Banking Co. at ninety days sight to be accompanied by the following documents:

"Commercial Invoice

"Consular Invoice

"Complete set of clean negotiable on board ocean bills of lading all evidencing shipment of 500 bags of coffee from Victoria, Brazil to New Orleans, La.: . . .

"Bills of lading for such shipments must be made to the order of Interstate Trust & Banking Company, New Orleans, La. . . .

"We hereby engage with the bonafide holders, endorsers, and drawers of such drafts drawn under and in compliance with the terms of this credit, that same will meet with due honor on presentation and delivery of documents as specified at Interstate Trust & Banking Co., New Orleans, La., and will be paid at National City Bank of New York, New York, N. Y., if negotiated or presented on or before December 17th, 1932.

"Drafts drawn hereunder must bear upon their face the clause: 'Drawn under Interstate Trust & Banking Company, Letter of Credit 3203, dated December 14, 1932'."

On the same day that such letter of credit was so issued, i. e., December 14, 1932, Ornstein & Company drew a ninety-day sight draft on Interstate Trust & Banking Company, New Orleans, for $4,783 "which place to account of HIC/N—500 bags of coffee shipped . . . against £——— Credit No.——— dated ———, Interstate Trust & Banking Co., New Orleans, payable New York." This draft the drawee bank accepted on January 7, 1933, as payable at the National City Bank in New York on April 7, 1933. On the latter date, the draft was presented for payment in accordance with the acceptance, but to this day remains unpaid.

Such acceptance took place either after the receipt of the coffee shipment, since on January 3, 1933, or 4 days prior to said acceptance, Hickerson Importing Company made written application to the Interstate Trust & Banking Company for leave to withdraw, on the terms and conditions of a thereto subjoined trust receipt, certain documents thereinafter described as the consular invoice and bill of lading covering the 500 bags of coffee purchased from Ornstein & Co. (and which had come attached to the ninety-day sight draft for $4,783 upon its presentation for acceptance) for delivery of said coffee "against sales"; or, in anticipation of the expected early arrival of the coffee shipment.

The coffee, so withdrawn from the bank's possession under such trust receipt arrangement, was marketed in due course by the defendant Hickerson Importing Company, which on February 2, 1933 (much in advance of the date on which the bank stood unconditionally bound to pay the accepted ninety-day sight draft drawn on it by Ornstein & Company) did remit and pay from out of the proceeds of such marketing,

unto said Interstate Trust & Banking Company the sum of $4,804.85, being the full amount of the draft, plus the usual banker's commission, but less a 63-days' rebate at ½ per cent on the amount of the letter of credit, inasmuch as the bank was then being placed in possession of the funds necessary to protect it against its acceptance and its obligation to pay the $4,783 on April 7, 1933.

The contract of sale undoubtedly provided that the purchased coffee was to be paid for by a ninety-day sight draft on New York under the credit of the Interstate Trust & Banking Company of New Orleans, from which a letter of credit "for about $4800.00" was to be obtained and furnished the seller.

When the special irrevocable letter of credit in the defendant's favor was issued by the bank on December 14, 1932, and it thereafter accepted the Ornstein & Company ninety-day sight draft for $4,783 drawn on the same date, to cover the sale price of the coffee at issue, the bank's liability to the plaintiff became absolute; and the defendant Hickerson because of his having duly caused the issuance of the required letter of credit and the acceptance of the ninety-day sight draft drawn under the credit of the Interstate Trust & Banking Company, as was agreed upon as the medium of reimbursement or payment to the seller for the coffee shipped to the said bank, can not be justly held to again make payment for said coffee. His each and every obligation under the sales contract which was prepared, and presented to him for execution, by plaintiff's authorized agent has been discharged.

The case of Vivacqua Irmaos, S. A. v. Hickerson, 193 La. 495, 190 So. 657, which was decided in 1939, was one wherein the defendant here was also defendant. It arose out of a similar coffee sale, with like irrevocable letter of credit issued by the Interstate Trust & Banking Company, a like ninety-day sight draft drawn by the seller upon said bank and due acceptance thereof, a like trust receipt withdrawal and a like marketing of the coffee by the defendant, with the bank paid the proceeds of sale up to the amount required to protect it against its absolute liability to the coffee seller, by reason of its acceptance of the sight draft.

It is contended by the plaintiff herein that there is a distinction to be drawn between that case and the present one, because (so it insists) in the former case it was the seller that required the letter of credit to be issued by the Interstate Trust & Banking Company, whilst here, it was the buyer.

But neither buyer Hickerson nor seller Ornstein & Company "required" anything other than as reflected by the written contract. The minds of the contracting parties met as to the method of payment and the contract provision that reimbursement was to be by a ninety-day sight draft drawn by the seller under credit of Interstate Bank &

Trust Company, which bank the buyer was to cause to issue a letter of credit "for about $4800.00," was a contract provision that was mutually agreed upon.

The credit of the Interstate Trust & Banking Company, as in the Vivacqua case, was satisfactory to Ornstein & Company, and it was on the basis of the bank's assumed financial standing—conceivably superior to that of the defendant in the eyes of the South American exporter because it was a bank and one through which the seller had already satisfactorily concluded no less than eleven similarly-conducted coffee sales to said defendant—that the sale of the 500 bags of coffee was effected.

"Reimbursement," as held the Supreme Court in said Vivacqua case, means "payment," and Ornstein & Company contracted with defendant Hickerson to pay for the coffee sold him by his causing the Interstate Trust & Banking Company to accept the seller's ninety-day sight draft under its own credit and to issue the required letter of credit.

If the defendant in that case discharged his contractual obligation by (1) furnishing the seller with the letter of credit there in question, (2) by causing the acceptance by said seller's sight draft drawn upon it, and (3) by paying the bank, before maturity, the required amount to cover said acceptance, then in this present case, the same defendant has done as much.

The Supreme Court held in the Vivacqua case that he should not be held to pay a second time for his coffee purchase. Neither should he be here condemned to so do.

Findings of Fact

1. Ornstein & Company and its agent, L. C. Fallon & Company, at the time of the confection of the sales contract of November 17, 1932, intended that the coffee purchased by Hickerson Importing Company should be paid by the Interstate Trust & Banking Company in ninety days from its acceptance of the seller's sight draft upon it in the sum of $4,783, under the required letter of credit which both knew was to be issued with their entire approval and as required by the said sales contract by no other bank than the Interstate Trust & Banking Company.

2. This course was the established and approved method of transacting coffee sales by Ornstein & Company (acting through L. C. Fallon & Company, its agents) to Hickerson Importing Company.

3. No less than eleven (11) such coffee sales, under similar conditions, had taken place between the parties from May 19, 1932, up to the date of the sales contract now in issue, i. e., the one of November 17, 1932.

4. Apparently understanding from advices received by it from its

duly authorized agents, L. C. Fallon & Company, that said transaction was under the credit of the Interstate Trust & Banking Company, the seller Ornstein & Company actually shipped the coffee on December 11, 1932 (before the issuance on December 13, 1932, of the bank's letter of credit), consigning such coffee to the bank; and three days thereafter, it drew upon the bank for the sales price of the coffee.

5. The defendant duly paid to said Interstate Trust & Banking Company on February 2, 1933, the full amount of the so-drawn ninety-day sight draft of $4,783, which said Interstate Trust & Banking Company had accepted on January 7, 1933, for payment to be made on April 7, 1933.

Conclusions of Law

1. The defendant, William H. Hickerson, Jr., doing business under the trade name of Hickerson Importing Company, has discharged his each and every obligation under the sales contract of November 17, 1932.

1. The plaintiff's suit should therefore be dismissed, with costs.

Let judgment be accordingly entered.

BANK'S LIEN ON STOCK

First Bank & Trust Company of Ottumwa v. Whipp, Supreme Court of Iowa, 299 N. W. Rep. 424

The lien granted state bank or trust company by Iowa statute on its own stock for indebtedness of stockholders extends only to transactions between bank and its stockholders, and does not cover obligations given by stockholder to a third person and assigned to the bank.

Plaintiff filed the notes executed to it by decedent, Mrs. Simmons, as a claim against the estate and brought suit thereon. The defendant, executor, pleaded the statute of limitations. He also pleaded a counterclaim against the plaintiff bank alleging it converted bank stock pledged by a stockholder to Mrs. Simmons to secure his debt to her. This stockholder was also indebted to plaintiff which claimed a prior lien on the stock as against the defendant through section 9221.2, 1939 Code. Jury waived. The trial court allowed the plaintiff's claim based on the notes, held the bank had a prior lien on the stock pledged to Mrs. Simmons and dismissed defendant's counterclaim. Affirmed as to that part of the judgment allowing plaintiff's claim against the estate. Reversed as to that part of the judgment giving plaintiff a prior lien on the pledged stock and dismissing defendant's counterclaim.

Affirmed in part; and reversed in part.

Jones & White, of Ottumwa, for appellee.

McNett, Kuhns, McNett & Aiken, of Ottumwa, for appellant.

STIGER, J.—In 1930 Elizabeth Simmons executed a note for $13,000 payable to the First Trust and Savings Bank of Ottumwa. In 1931 she executed two notes to the First National Bank of Ottumwa aggregating $600.

In 1929 W. B. Bonnifield, president of the above named banks, borrowed $15,000 of Elizabeth Simmons and pledged to her 170 shares of his stock in said banks as security for the loan.

On October 3, 1931, the said banks and two other banks consolidated and merged into the First Bank and Trust Company of Ottumwa, a new corporation, plaintiff herein. In the consolidation agreement plaintiff was called the consolidated bank and the four banks were called contributing banks. At the time of the consolidation, Mr. Bonnifield was indebted to the First National Bank of Ottumwa in the amount of $10,000. At said time the bank owned the note of Will H. Wycoff in the sum of $23,970 and held as collateral security Bonnifield's $25,000 note to Wycoff which was secured by real estate mortgage.

Under the terms of the consolidation, plaintiff assumed the liabilities of the four banks and was given selected assets of the banks. Each stockholder received from the plaintiff bank under the consolidation one share of stock for each share of stock owned in the consolidated banks, par value $50.

In setting up the assets of the plaintiff bank, pursuant to the consolidation, the total indebtedness of Bonnifield to the First National Bank in the sum of $33,728.40, which included his note to Wycoff in the sum of $23,970, held by the bank as collateral security was, at the direction of the examiner in charge, evidenced by a note of Henry Hervey, trustee, to plaintiff in said sum which note listed as collateral the three Bonnifield notes formerly held by the First National Bank. The trustee's note bore the notation "with no personal liability" and it is apparent that, regardless of this method of transfer, the two notes given by Bonnifield to the First National Bank and his note to Wycoff became assets of the plaintiff bank.

Bonnifield surrendered his stock in the two banks, part of which had been pledged to Mrs. Simmons, and received in lieu thereof an equal number of shares in plaintiff bank. Mrs. Simmons was a stockholder in the two contributing banks and consented to the consolidation. After the consolidation Bonnifield, on January 2, 1932, executed a new note for $13,000 to Mrs. Simmons, $2,000 having been paid on his $15,000 note to her, and assigned by separate instruments 179 shares of stock in plaintiff bank to her as security which assignment, stock and note were delivered to Mrs. Simmons. No notice of the transfer of this stock

or the stock in the consolidated banks as collateral to Mrs. Simmons was ever given as required under the provisions of section 8387, 1939 Code.

Mrs. Simmons died in March, 1933, and Mr. Bonnifield and defendant, Leslie H. Whipp, were appointed executors. Bonnifield, who was the active executor, obtained possession of the stock in plaintiff bank which he had pledged to Mrs. Simmons and on January 22, 1936, surrendered his 509 shares, par value $25, of stock to the plaintiff in full settlement of his indebtedness in the sum of $33,000.

The stock surrendered to the bank in settlement of the indebtedness included the 179 shares of stock Mr. Bonnifield had pledged to Mrs. Simmons. As shown above, plaintiff and defendant are creditors of Bonnifield.

Plaintiff claims a prior lien on the bank stock pledged by Bonnifield to Mrs. Simmons by virtue of section 9221.2, 1939 Code for the amount of Bonnifield's indebtedness.

Defendant, executor of the estate of Mrs. Simmons, claims his right to the stock under the pledge is superior to any right that the bank may have therein.

Plaintiff also asserts that it did not have notice of the pledge of the stock required by section 8387 at the time it obtained Bonnifield's stock in full settlement of his indebtedness in 1936, and therefore, acquired the stock free from the pledge lien.

We will first consider whether plaintiff had a prior lien for Bonnifield's indebtedness on the bank stock pledged by him to Mrs. Simmons under the provisions of section 9221.2, 1939 Code, which reads:

"9221.2 Owning or loaning on its own stock—prior lien of bank. No state bank, savings bank, or trust company shall make any loan or discount on the security of the shares of its own capital stock, or be the purchaser or holder of any shares, unless such security or purchase shall be necessary to prevent loss upon a debt previously contracted in good faith, and stock so purchased or acquired shall be sold at public or private sale, or otherwise disposed of, within one year from the time of its purchase or acquisition unless the time is extended by the superintendent of banking.

"State banks, savings banks, and trust companies shall have prior lien on their debtors' shares of stock for all obligations of the bank subject, however, to loans against the stock which the bank has acknowledged by written notice."

Appellant's first proposition is that plaintiff did not have a statutory lien on the pledged stock as security for Bonnifield's note to Wycoff in the sum of $23,000 held as collateral security because it was not a direct indebtedness of Bonnifield to plaintiff bank. With this contention we agree.

The second paragraph of the section gives a bank a prior lien on

its debtors' shares of stock for all obligations to the bank. This paragraph limits the lien of a bank on its debtor's shares of stock to all direct obligations of the debtor shareholder to the bank. An obligation of a shareholder to a third person and subsequently acquired by the bank is not within the scope of the paragraph.

To give the bank a lien on the stock of its stockholder whenever it acquired his debt to third persons, of which acquirement the stockholder might be unaware, would make the status of his stock as to encumbrances uncertain and prejudice him in a manner clearly not contemplated by the legislature. In the case of Boyd v. Redd, 120 N. C. 335, 27 S. E. 35, 36, 58 Am. St. Rep. 792, the bank's charter gave the bank a lien on shares of its stockholders to secure any indebtedness by them to the bank. The opinion, in holding that the statutory lien on the stock was intended to secure only the direct indebtedness of a stockholder to the bank, either as principal or surety, and was not intended to secure an involuntary indebtedness to it caused by the purchase of his liability to a third person, states:

" 'It is clear that at common law a corporation has no lien upon the shares of its stockholders for debts due from them to the company. The policy of the common law has always been to discountenance secret liens, inasmuch as they hinder trade and restrict the safe and speedy transfer of property.' Cook, Stock & S. § 521; 2 Thomp. Corp. § 2317; 2 Wat. Corp. 227; Heart v. [State] Bank, 17 N. C. 111. The statute, in such cases, being in derogation of common right, must be strictly construed to the purpose of its enactment. That purpose is thus clearly stated in Bank v. Smalley, 2 Cow. 770 [14 Am. Dec. 526]: 'This clause in bank charters is intended merely for the protection of the bank, i. e. to give them a lien on the stockholder for what he owes the bank.' "

As stated in 7 Am. Jur. page 59, section 62, "The lien, however, extends only to transactions between the bank and its stockholder and does not cover obligations given by him to a third person and assigned to the bank."

It follows that appellant's contention that plaintiff did not have a statutory lien on the stock pledged to Mrs. Simmons as security for Bonnifield's note to Wycoff held as collateral must be sustained.

We cannot agree with appellant's further proposition that plaintiff acquired the two notes given by Bonnifield to the First National Bank in the sum of $10,000 by purchase and therefore did not have a lien for this indebtedness as it was not a direct indebtedness of Bonnifield to plaintiff.

The assets of the old banks were set up as the assets of the new bank by the superintendent of banking and the notes of Bonnifield to the First National Bank in the sum of $10,000 were carried on the set-up on the books of plaintiff as direct obligations of Bonnifield to the plaintiff. The effect of the consolidation, as to these notes, was to substitute

the plaintiff as direct obligee in the notes in lieu of the First National Bank.

We hold that this indebtedness is a direct obligation to plaintiff which acquired a statutory lien on the stock issued to Bonnifield superior to the lien of Mrs. Simmons under her pledge if the circumstances essential to the lien required by section 9221.2 were present. When Mrs. Simmons accepted from Bonnifield the pledge of his stock in plaintiff bank for his indebtedness to her in lieu of the First National Bank stock, she took it subject to whatever statutory lien plaintiff had under section 9221.2.

The first paragraph of said section provides that a bank shall not loan on the security of its shares or be the purchaser or holder of any such shares "unless such security or purchase shall be necessary to prevent loss upon a debt previously contracted in good faith."

This paragraph prohibits the bank from acquiring its stock unless it is necessary to prevent loss upon a debt previously contracted in good faith with the debtor stockholder. Stock acquired by a bank within the terms of the statute permits it to set off its stock liability against the liability of its debtor shareholder. In enacting the second paragraph of the statute it must be presumed the Legislature intended its provisions to be consistent with and not in direct contradiction to the provisions of paragraph one. Paragraph one prohibits a bank from holding its shares as security unless necessary to prevent loss. We hold that under paragraph two the bank has a prior lien on its debtors' shares of stock as security when necessary to prevent loss on the debt.

In the case of Reddin v. Wilson, D. C. Iowa, 11 F. Supp. 691, the contest was, as in the instant case, between a bank claiming a lien under section 9221.2 for a direct obligation of its stockholder and a creditor of the stockholder to whom the stock was pledged as security, each creditor claiming a prior lien on the stock. We agree with the following views of Judge Scott on this section. The opinion, after reviewing the history of this Legislation, states 11 F. Supp. loc. cit. 693:

"When such condition arises [necessity of acquiring stock to prevent loss], the apparent intent of the Legislature was that, while the bank had been prohibited under the first clause from making loans upon the security of its shares originally, it might under the second clause become the purchaser or holder to prevent loss, but with the onus of being required to dispose of the same within one year or such further time as the superintendent of banking might permit. The Legislature at this point of construction seems to have foreseen the probability of contest for priority in the presence of the conditions named. It therefore added the second and last sentence now quoted: 'State banks, savings banks, and trust companies shall have prior lien on their debtors' shares of stock for all obligations to the bank subject, however,

to loans against the stock which the bank has acknowledged by written notice.'

"If one is to give all parts of section 15 [Ch. 30 43rd General Assembly, now section 9221.2] force and effect and reconcile terms and provisions first apparently conflicting, I think the last sentence providing for priority of lien must be limited to the scope of the second clause of the first sentence and both sentences construed together; that is to say, the priority of lien provided for in the second sentence arises only when the conditions are present which would result in a loss on a debt previously contracted in good faith by the issuing bank. . . . This interpretation of course makes the prior lien specified in the second sentence of the section a qualified one, but to interpret otherwise and assume a legislative intent to create a real and absolute lien from the origin of the stockholder's obligation to the bank would, I think, nullify the first clause of the section, for it would be idle to say that the bank did not loan upon the security of its shares when security must automatically arise through the very making of the loan."

The stipulation filed in the instant case stated that the two notes in the sum of $10,000, which represented the direct indebtedness of Bonnifield to plaintiff, and the Wycoff collateral note in the sum of $23,000, could not have been collected by plaintiff without resorting to the stock of Bonnifield. However, the record does not disclose that plaintiff could not have collected the two direct obligations of Bonnifield in the sum of $10,000 during the time Mrs. Simmons or defendant held the pledged stock without resorting to it as security. The prior lien given by the statute attached to the stock only during the time and to the extent it was necessary to prevent loss to the bank. Therefore, plaintiff did not have a statutory lien on the pledged stock for Bonnifield's indebtedness.

As a national bank does not have a lien on bank stock of its debtor shareholder and as Bonnifield was not indebted to the Savings Bank, neither of the contributing banks had a statutory lien on the stock pledged to Mrs. Simmons to secure Bonnifield's indebtedness to her prior to the consolidation. Appellant claims that in taking over the assets of said banks, plaintiff did not have "more security than the First National Bank," that is, appellant asserts, plaintiff did not have a lien on its stock issued to Bonnifield which was pledged to Mrs. Simmons after the consolidation. We do not agree with this contention. Under the consolidation, Bonnifield's indebtedness to the First National Bank and Savings Bank became direct obligations to plaintiff bank for which plaintiff had a statutory lien and Mrs. Simmons accepted the pledge of Bonnifield's stock in plaintiff bank charged with knowledge of the provisions of Section 9221.2.

Plaintiff contends that, aside from the question of whether it had a

statutory lien under section 9221.2 superior to the lien of Mrs. Simmons under her pledge, it obtained from Bonnifield all of his stock in the bank, including Mrs. Simmons' pledged stock, in satisfaction of Bonnifield's indebtedness without receiving the statutory notice of the transfer of the shares as collateral to her as required by section 8387, and therefore, owns the stock free of the lien of the pledge. It is conceded that neither Mrs. Simmons nor the executors of her estate gave statutory notice of the pledge.

Sections 8386 and 8387, 1939 Code, were originally one section. See section 1626, Code of 1897. Section 8386 provides that the transfer of shares is not valid, except as between the parties thereto until regularly entered upon the books of the company, etc.

Section 8387 reads: "8387 Transfer of shares as collateral. When any shares of stock shall be transferred to any person, firm, or corporation as collateral security, such person, firm, or corporation may notify in writing the secretary of the corporation whose stock is transferred as aforesaid, and from the time of such notice, and until written notice that said stock shall have ceased to be held as collateral security, said stock so transferred and noticed as aforesaid shall be considered in law as transferred on the books of the corporation which issued said stock, without any actual transfer on the books of such corporation of such stock."

Plaintiff relies on the following pronouncement in Maloney v. Storjohann, 206 Iowa 721 loc. cit. 723, 221 N. W. 208, loc. cit. 210:

"Section 1626 [8387], supra, which requires a transfer of the stock of a corporation to be entered on the books of the company, or that notice thereof be given when pledged as collateral security, is imperative, and no transfer is valid unless one of these provisions is complied with. Fort Madison Lumber Co. v. Batavian Bank, 71 Iowa 270, 32 N. W. 336, 60 Am. Rep. 789; Ottumwa Screen Co. v. Stodghill, 103 Iowa 437, 72 N. W. 669; Perkins v. Lyons, 111 Iowa 192, 82 N. W. 486; First Nat. Bank v. Way, 167 Iowa 426, 149 N. W. 503; National City Bank v. Fairbank State Bank, 173 Iowa 489, 155 N. W. 963. . . . This statute has always been strictly construed. . . . Actual knowledge, however, of the secretary, does not supersede the necessity of notice, nor is actual notice of the secretary sufficient to protect the lien of one holding it as collateral security against the claims of creditors who have levied thereon."

The Maloney case correctly states the rule applicable to a contest between creditors of the stockholder other than the bank but does not control the decision of the question before us. The transfer by Bonnifield of the stock of Mrs. Simmons as collateral was valid between the parties under sections 8386 and 8387, which sections must be construed together, and this transfer must be sustained unless the plaintiff bank

has established a superior interest in the stock. Section 9221.2 prohibits a bank from dealing in its own stock unless necessary to prevent loss upon a debt previously contracted with the stockholder in good faith.

Plaintiff relies on the statement in the stipulation that from the time of the consolidation in 1931 to the time of the settlement of the Bonnifield indebtedness by his conveyance to plaintiff of his stock in 1936, the total indebtedness of Bonnifield of $33,000, which included his note to Wycoff, in the sum of $23,000, could not have been collected by the bank without resorting to the bank stock.

But the indebtedness of Bonnifield to Wycoff was not a debt previously contracted by Bonnifield to the bank and was not a debt for which the statute permitted plaintiff to acquire Bonnefield's stock.

As heretofore stated the record does not show that the acquisition of Bonnifield's stock in 1936 pledged to Mrs. Simmons was necessary to prevent loss upon the direct debt of Bonnifield to the bank previously contracted in the sum of $10,000. It appears that at the time of the settlement Bonnifield owned 80 acres of unencumbered land worth $8,000 and the bank held certain stock as collateral security for his indebtedness which was worth over $13,000. After deducting the 170 shares pledged to Mrs. Simmons from the 509 shares conveyed to the bank by Bonnifield it had 339 shares of its stock worth over $8,000. As plaintiff has not established the holding of the 170 shares which had been pledged to Mrs. Simmons was necessary to prevent loss upon the direct indebtedness of Bonnifield, the conveyance of these shares to the bank was ultra vires and did not affect the pledgee's rights therein. We hold defendant executor's right to the 170 shares of stock of plaintiff bank pledged by Bonnifield to Mrs. Simmons superior to the claim of the bank and appellant's contention that plaintiff converted said shares must be sustained. Defendant was entitled to judgment on the counterclaim.

APPLICATION OF STATUTE OF LIMITATIONS

Merrimack Loan Co., Inc. v. Theodorou, Supreme Court of New Hampshire, 22 Atl. Rep. (2d) 855

A partial payment constituting an acknowledgment of the debt made by one of two joint debtors binds only the debtor who makes the payment and does not suspend the running of the statute in favor of the other debtor.

In this case defendant obtained a loan from a licensed small loan company. The loan was evidenced by a promissory note for $300,

NOTE—For similar decisions see Banking Law Journal Digest (Fifth Edition) §1406.

payable in monthly installment of $30, with interest at the rate of three per cent a month. This note was signed by the defendant and his brother. After January 12, 1932, the defendant made no payment on the loan or otherwise acknowledged his indebtedness. A payment of $10, however, was made by the brother on September 24, 1934. In an action brought by the loan company on September 11, 1939, for balance due on loan, defendant pleaded the statute of limitations and plaintiff relied on payment made by defendant's brother to suspend the running of the statute. It was held that in order for the plaintiff to rely on the payment made to stop the running of the statute of limitations, the plaintiff must not only establish that payment was made, but made by authority of the defendant.

Assumpsit by Merrimack Loan Company, Inc., against George Theodorou for balance due on a loan. At the conclusion of the plaintiff's evidence, a nonsuit was ordered, and the cause was transferred by the trial judge on plaintiff's exceptions.

Judgment for the defendant.

Assumpsit, to recover the balance due on a loan made to the defendant by the plaintiff. The defendant pleaded the statute of limitations, P. L. c. 329, § 3. Trial by jury. At the conclusion of the plaintiff's evidence a nonsuit was ordered subject to the plaintiff's exception. The plaintiff also excepted to the conclusion of certain evidence. Transferred by Young, J.

The facts are stated in the opinion.

Ora W. Craig of Concord, for plaintiff.

Richard F. Upton and Robert W. Upton, both of Concord, for defendant.

MARBLE, J.—On August 6, 1930, the defendant obtained a loan from the plaintiff, who held a license from the bank commissioner to make small loans in accordance with the provisions of section 1 of chapter 269 of the Public Laws. The loan was evidenced by a promissory note for $300, payable in monthly installments of $30, with interest at the rate of three per cent a month. This note was signed by the defendant and his brother, Louis Theodorou. The present action was commenced on September 11, 1939. After January 12, 1932, the defendant made no payment on the loan or otherwise acknowledged his indebtedness unless a payment of $10 made by Louis Theodorou on September 24, 1934, can be found on the evidence to constitute a payment by the defendant.

It is the rule in this jurisdiction that a partial payment constituting an acknowledgment of the debt made by one of two joint debtors binds only the debtor who makes the payment and does not suspend the running of the statute in favor of the other debtor. Exeter Bank v. Sullivan, 6 N. H. 124, 137; Kenniston v. Avery, 16 N. H. 117, 118; Whipple v.

Stevens, 22 N. H. 219, 226, 227; Tappan v. Kimball, 30 N. H. 136, 141; Meredith, etc., Bank v. Ladd, 40 N. H. 459, 468.

The plaintiff does not question the soundness of this rule but contends that the evidence warrants a finding that the payment in 1934 was made by Louis Theodorou for the defendant and with the defendant's knowledge and authorization.

The defendant testified that Louis Theodorou was the recipient of the proceeds of the loan and that he (the defendant) had signed the note merely for his brother's accommodation and had never made or offered to make any payments on it. This the plaintiff denied. Louis Theodorou did not testify.

The plaintiff's treasurer testified that he "got after" Louis on account of this indebtedness and threatened "to take legal action" against George, the defendant, who was then working at the Salem race track; that Louis said he would "see George and have a talk with him," and that later Louis "came in and made a payment of $10," telling the treasurer that "he was going to pay each week" so that no legal action would be taken.

Any inference from this testimony that the defendant authorized Louis, who was himself liable on the note, to make the $10 payment or to promise future payments would be conjectural. It is true that the defendant on being asked the question, "Anybody pay any money at your request or at your direction?" answered: "Really I don't know, I never paid myself anything." But this question was a general one with no specific reference to the payment of 1934. Small monthly payments had been made with substantial regularity down to January 12, 1932. Hence, even if the answer justified a finding that the defendant had at some time directed Louis to make a payment on the note, it could not fairly be found from that fact that any particular payment had been authorized.

At the time Louis made the $10 payment he was indebted to the plaintiff for the balance due on a loan of $100 made to him on December 23, 1930. Plaintiff's counsel contends that it is improbable that Louis would have made a payment with his own money on the joint note when he was liable to the plaintiff for the balance due on this other indebtedness. The plaintiff excepted to the ruling of the court excluding a record card showing the complete details of this latter transaction.

In answer to counsel's contention it may be suggested that inasmuch as the plaintiff had "got after" Louis because payments on the joint note were not being made, Louis was quite as likely to have made a payment on that note as on the other indebtedness. The record card which the Presiding Justice excluded was marked for identification and is before us. It shows merely the date and amount of the loan and the dates and amounts of the various payments made. As defendant's counsel

assert, it fails utterly to supply the fatal defect in the other evidence. Its exclusion did not constitute error.

"The party relying on a payment to stop the statute must not only establish that it was made, but made by the authority of the defendant." Regan v. Williams, 185 Mo. 620, 631, 84 S. W. 959, 961, 105 Am. St. Rep. 600. Since the plaintiff has not sustained this burden, it is unnecessary to consider the defendant's contention that the plaintiff's computation of interest on the loan in question was in violation of the provisions of chapter 269 of the Public Laws.

Judgment for the defendant.

SALE OF COLLATERAL HELD AS SECURITY FOR NOTE

National Bank of Fayette County v. Valentich, Supreme Court of Pennsylvania, 22 Atl. Rep. (2d) 724

A promise by a bank, holding collateral as security for a note, to sell the collateral at the request of the pledgor, which it was theretofore under no obligation to do, would be unenforceable for want of consideration.

In this case the collateral note contained the terms under which the collateral was pledged and defined the rights of the pledgee with respect thereto. It was held that such provisions could not be modified or added to by an alleged contemporaneous oral understanding that pledgee would sell the collateral on request, in the absence of proof or fraud, accident or mistake. The fact that the cashier of the bank, holding the collateral as security for the note, testified that it was the custom of the bank to sell collateral at the pledgor's request if the proceeds would be sufficient to pay off the indebtedness, did not place the bank under obligation to follow any such custom in a particular instance, there being no proof of a general trade or business usage which impliedly entered into its contracts.

Action on note by the National Bank of Fayette County now in the hands of Jess E. Pilson, receiver, against Mike Valentich, wherein defendant filed counterclaim. From a judgment for plaintiff notwithstanding the verdict in favor of the defendant on the counterclaim, defendant appeals.

Affirmed.

Linn Voorhees Phillips, James Clarke Glassburn, and Paul Vincent Mahoney, all of Uniontown, for appellant.

E. H. Bane, of Uniontown, for appellee.

NOTE — For similar decisions see Banking Law Journal Digest (Fifth Edition) §1284.

STERN, J.—This is an action on two collateral promissory notes of which defendant was the maker and plaintiff bank the payee, the one dated December 31, 1928, for $11,817.33, the other September 10, 1929, for $4,918.75. Accompanying the first note as collateral security were shares of United States Steel Corporation, Maytag Company, Shell Union Oil Company, and Pacific Western Oil Company; with the second note as collateral were shares of United Fruit Company. The United States Steel stock was sold by the bank in 1937, and most of the other stocks in 1939.

In the affidavit of defense originally filed defendant admitted that he paid interest on the notes at various times, the last payment being on March 19, 1930; he denied that he made payments on September 6, 1930, and April 9, 1931, as alleged by plaintiff and therefore claimed that, as the suit was not begun until April 9, 1937, the action was barred by the statute of limitations. He counterclaimed for the proceeds of the collateral sold by plaintiff and for the market value of the portion remaining in its hands. At a pre-trial conference, however, he conceded that the counterclaim did not set forth a good cause of action, and, two years after the filing of the first affidavit, he filed an amended affidavit of defense and counterclaim. He now averred that when he executed each of the notes the bank orally agreed that it would sell the collateral at any time upon his request provided the proceeds would be sufficient to pay the indebtedness. He alleged that on October 22, 1929, he instructed the bank to sell the securities, but, although it promised to comply with this instruction, it failed to do so. His amended counterclaim was for the excess of the then market value of the stocks over the amount due on the notes.

At the trial plaintiff produced evidence to prove that payments of interest were made by defendant on September 6, 1930, and April 9, 1931. Defendant made no attempt to controvert this and apparently abandoned his contention that plaintiff's claim was barred by the statute of limitations; accordingly, that issue was not submitted to the jury. He did, however, testify that the bank made the oral agreements with him, and that, in July, 1929, on his again asking whether it would sell the securities when requested it agreed that it would. He further testified that on October 22, 1929, he telephoned the bank to sell all the stocks and was told it would do so. On the 25th there was a break in the market and the stocks dropped considerably in price. On the 26th, upon visiting the bank, he found that the securities had not been sold. When he inquired as to the reason for this, Mr. Hess, the cashier, told him, "Oh, they will come back," to which he replied, "They may come back. I don't know anything about it." Mr. Hess, called by plaintiff, stated it was the custom of the bank to sell collateral whenever requested provided the proceeds would be sufficient to meet the indebtedness, but he denied any recollection of the alleged oral agreements

or the telephone request of defendant to sell. The jury rendered a verdict in favor of defendant for the greater portion of his counterclaim, but the court entered judgment for plaintiff n.o.v. for the amount due on the notes. Defendant appeals.

In the absence of an agreement to the contrary, a pledgee is under no duty to sell collateral at the request of the pledgor; the latter's obligation is to pay the indebtedness and thereby entitle himself to a return of the collateral. Tradesmen's National Bank v. Cummings Bros. Co., 306 Pa. 280, 283, 159 A. 452, 454; Gordon, Secretary of Banking v. Mitchell, 320 Pa. 277, 182 A. 386. Defendant, admitting this, relies upon the alleged oral contemporaneous agreements, but he is precluded from asserting them. The notes covered the terms under which the collateral was pledged and defined the rights of the pledgee with respect thereto, and such provisions cannot be modified or added to by alleged oral understandings unless there is proof of fraud, accident or mistake. Gianni v. Russell & Co., Inc., 281 Pa. 320, 126 A. 791; Speier v. Michelson, 303 Pa. 66, 154 A. 127; Richards v. Integrity Trust Co., 317 Pa. 513, 177 A. 28. The last named case was much like the present one; it involved an attempt to enforce an oral agreement that the pledgee trust company would sell within a reasonable time the stock pledged with it as security for a loan, but it was held that testimony in regard to such an agreement was barred by the parol evidence rule. Nor does defendant stand on any firmer ground in regard to the alleged promises made by the bank in July and October, 1929. Although it is true that a written instrument may be varied by a subsequent oral agreement, the latter must be founded upon a valid consideration. Tradesmen's National Bank v. Cummings Bros. Co., 306 Pa. 280, 159 A. 452; Murray v. Prudential Insurance Co. of America, 144 Pa. Super. 178, 187, 18 A. 2d 820, 824.

A promise by the bank to sell the collateral at the request of defendant, which it was theretofore under no obligation to do, would be unenforceable for want of consideration. Union Trust Company v. Long, 309 Pa. 470, 164 A. 346; Gordon, Secretary of Banking v. Mitchell, 320 Pa. 277, 182 A. 386; Hickey v. Wyoming Bank & Trust Co., 334 Pa. 350, 6 A. 2d 62. Defendant does not claim that the bank's alleged promises induced him to act or to omit any action he otherwise might have taken, and therefore he cannot invoke the principle of promissory estoppel. Fried v. Fisher, 328 Pa. 497, 501, 196 A. 39, 41, 115 A. L. R. 147. He makes something of the fact that the cashier testified it was the custom of the bank to sell collateral at the pledgor's request if the proceeds would be sufficient to pay off the indebtedness, but it was not obliged to follow any such custom in a particular instance, there being no proof of a general trade or business usage which impliedly entered into its contracts.

There is a final reason why defendant's position is untenable. When

he visited the bank on October 26, 1929, and found that the securities had not been sold, he made only the ambiguous comment previously quoted. The law would not permit him to stand by in such a stiuation and acquire an option to ratify if the stocks enhanced in value or to repudiate should there be a further fall in the market. Hayward v. Eliot National Bank, 96 U. S. 611, 24 L. Ed. 855. Not only did he not register a definite protest against the failure of the bank to sell, but he admits that nearly five months later he paid interest on the notes; had he intended to repudiate the breach of the bank's alleged agreement, he would not then have regarded himself as indebted either for interest or principal, but, on the contrary, as entitled to the counterclaim he is now asserting; by the payment of interest he was performing an unequivocal act of affirmance by which he is now concluded. Granger v. Fidelity Trust Co., 198 Pa. 428, 48 A. 259; 21 R. C. L. 693, § 52; compare Montgomery v. Van Ronk, 328 Pa. 508, page 511, 195 A. 910, page 911, where it was said in reference to a similar situation in the case of a stockbroker: "Affirmative repudiation is necessary to prevent an implied ratification. He [the customer] cannot stand by and appropriate the benefit of the broker's conduct if profitable, or renounce it if otherwise, at his election; he cannot speculate at the broker's expense."

CONSIDERATION FOR RENEWAL NOTE

Western Savings & Deposit Bank v. Sauer, Supreme Court of Pennsylvania, 22 Atl. Rep. (2d) 727

An antecedent or pre-existing debt constitutes value for a renewal note. Where, as in this case, an accommodation indorser was under legal obligation to pay a note, and on maturity thereof indorsed a renewal note instead of paying the original note, the renewal was supported by the consideration of the antecedent or pre-existing debt.

Action of assumpsit by Western Savings & Deposit Bank against Frederick C. Sauer on a negotiable promissory note indorsed by defendant. From a judgment for plaintiff for $3,444.55, entered on plaintiff's motion for judgment for want of a sufficient affidavit of defense and supplemental affidavit of defense, defendant appeals.

Affirmed.

Harold K. Brooks, of Pittsburgh, and Robert H. Ireland, of Aspinwall, for appellant.

NOTE — For similar decisions see Banking Law Journal Digest (Fifth Edition) §§53, 1347.

Joseph R. Doherty, Thomas D. McCloskey, and McCloskey, Best & Leslie, all of Pittsburgh, for appellee.

DREW, J.—This is an action of assumpsit by the Western Savings and Deposit Bank of Pittsburgh upon a negotiable promissory note endorsed by Frederick C. Sauer, defendant, dated November 13, 1933. Plaintiff Bank moved for judgment for want of a sufficient affidavit of defense and supplemental affidavit of defense. After argument, the learned court below granted the motion and ordered the entry of judgment against defendant, and from the judgment so entered defendant appealed.

Considering every material averment made by defendant as being admitted by plaintiff, the facts are: The note in suit was executed by Kate Richard and was made payable to the order of defendant who endorsed it in blank. It was delivered to plaintiff Bank and was given "for the unpaid balance" and "to cover the unpaid balance" of a promissory note executed on January 19, 1931, by J. F. Richard, the husband of Kate Richard, who died on September 17, 1931. Defendant averred that the original note was endorsed by him at the request of the president of the Bank to accommodate the Bank, and in reliance on a representation that it would be paid out of funds J. F. Richard had on deposit with the Bank. It was alleged that, on several occasions, there were sufficient funds on hand to pay this note in full. The estate of J. F. Richard was insolvent and plaintiff induced Kate Richard, after the note of her husband became due, to execute the note in suit. Defendant maintains that he also endorsed this note for the sole accommodation of the Bank.

It was admitted by defendant that his endorsement of the notes for the accommodation of the Bank is not available to him as a defense. That such fact does not constitute a defense was clearly pointed out in the opinion of the court below where it was said: "A person who executes an obligation 'for the accommodation of the bank' does so for the unlawful purpose of deceiving the creditors, stockholders, or depositors of the bank and the bank examiner who is acting for them. The courts will not relieve him of the consequences of his fraudulent act but will 'leave him bound who has bound himself'; Bangor Trust Co. v. Christine, 297 Pa. 64, 146 A. 545; Third National Bank v. Rodgers, 330 Pa. 523, 198 A. 320." Lycoming Trust Company v. Smithgall, 334 Pa. 4, 5 A. 2d 152.

By his own admission, defendant has shown that there is no merit in his second defense—want of consideration for the note in suit. He concedes that he was under a legal obligation to pay the original note. In section 25 of the Negotiable Instruments Act of May 16, 1901, P. L. 194, 56 P. S. § 62, it is provided that value "is any consideration suffi-

cient to support a simple contract. An antecedent or pre-existing debt constitutes value." That an antecedent or pre-existing debt constitutes value for a renewal note cannot be questioned: Third Nat. Bank & Trust Co. of Scranton v. Rodgers, 330 Pa. 523, 198 A. 320; Rathfon v. Locher, 215 Pa. 571, 64 A. 790; Vineland Nat. Bank & Trust Co. v. Kotok, 129 Pa. Super. 309, 195 A. 750; Brannon, Negotiable Instruments Law, 6th Ed., 397, 446 et seq. Thus, defendant did receive consideration for his endorsement and his averment that he signed for the accommodation of the Bank is refuted. He merely endorsed the new note instead of paying the old one.

There is no merit in defendant's other contention that the Bank should have paid the original note out of funds of Richard in the Bank, since there is no allegation that Richard had any funds in the Bank at the time the note matured. Since the defendant was bound in any event and the judgment must be affirmed, it is unnecessary to pass upon the question of the liability of the widow as maker of the note in suit.

DUTY OF TRUSTEE WHERE SETTLOR RETAINS RIGHT TO DIRECT INVESTMENTS

Day v. First Trust & Savings Bank of Pasadena, District Court of Appeal, California, 118 Pac. Rep. (2d) 51

In 1928 plaintiff, an experienced business man, entered into a trust agreement with defendant pursuant to which he delivered to it sum totaling about a million and a quarter dollars and allowed about $175,000 in income to be added to the trust, all of which the latter undertook to administer as trustee. Under this trust agreement plaintiff reserved the right to direct the trustee as to investments, but the trustee was permitted to act in the absence of direction from plaintiff. The next year plaintiff set up with defendant for the benefit of certain relatives two additional trusts, each amounting to about $85,000. In 1933, the first trust was revoked by agreement of the parties and in 1934, defendant resigned as trustee in the other two trusts. After waiting about three years plaintiff brought an action to recover damages from defendant trustee because of alleged failure to exercise due care in making and handling investments.

In holding that the defendant was not liable, the court reviewed the relationship of the parties in the administration of the trust and pointed out that while defendant did not contend that it would have been justified in negligently administering the trust because of

NOTE — For similar decisions see Banking Law Journal Digest (Fifth Edition) §§503, 530.

silent acquiescence of plaintiff in ill-advised investments, it was, nevertheless, obvious that the knowledge and experience of plaintiff made it inevitable that his views as to properties, persons and trends, even when casually imparted, would merit and receive appropriate consideration by defendant together with advise, recommendations and information from other sources.

Actions for damages for alleged breach of trust and for an accounting by George E. Day and others against the First Trust & Savings Bank of Pasadena and others. From judgments for the named defendant, the plaintiffs appeal.

Affirmed.

Loeb & Loeb, of Los Angeles (Milton H. Schwartz and Herman F. Selvin, both of Los Angeles, of counsel), for appellants.

Newlin & Ashburn, of Los Angeles (C. Hudson B. Cox and A. W. Ashburn, both of Los Angeles, of counsel), for respondent First Trust & Savings Bank of Pasadena.

SCOTT, J. pro tem.—Plaintiffs appeal from judgments for defendant First Trust and Savings Bank of Pasadena (hereinafter referred to as defendant) in three suits for damages for alleged breach of trust and for an accounting. Defendant Title Insurance and Trust Company was joined in two of the actions as defendant for the reason that it declined to join therein as a party plaintiff.

On February 4, 1928, plaintiff George E. Day, who is the principal party in interest in all three suits and to whom we shall hereafter refer merely as plaintiff, entered into a trust agreement with defendant pursuant to which he delivered to it sums totaling about a million and a quarter dollars and allowed about $175,000 in income to be added to the trust, all of which the latter undertook to administer as trustee. This relationship and the dealings thereunder furnish the basis for the principal suit we are about to consider. The next year plaintiff set up with defendant for the benefit of certain relatives two additional trusts, each amounting to about $85,000. These two trusts are the basis of the second and third suits, involve the same transactions and require no separate discussion. On December 26, 1933, the first trust was revoked by agreement of the parties and on January 30, 1934, defendant resigned as trustee in the other two trusts. In conformity with the agreement of December 26, 1933, defendant delivered all of the assets of the trusts to the successor trustee designated by plaintiff, except those which because of their nature, as will hereafter appear, it was necessary should remain in defendant's hands for administration. As to such subsequent management there is no complaint. At that time defendant also rendered to plaintiff a full, true and correct general accounting of its administration of the trust estate. Plaintiff reserved only any right he might have to establish liability of defendant for specific losses claimed

by him to have been incurred prior to December of 1933 through negligence or other misconduct of defendant, but agreed to wait three years before instituting any suit to recover therefor.

After waiting slightly more than three years plaintiff brought these actions seeking a general accounting and damages for alleged negligence constituting a breach of trust, claiming as to certain investments which had suffered a reduction in market value during the period in question that defendant should never have made them and that "the beneficiary may reject an improvident investment even though realized loss has not taken place," and claiming further that as to certain bonds defendant should have sold them before their prices went as low as they did. Neither bad faith nor illegality were charged against defendant. The plaintiff was refused an accounting and was denied damages by the trial court.

On appeal plaintiff expresses dissatisfaction with the court's finding that defendant was not negligent in its management of certain trust funds, its finding that plaintiff was guilty of laches and its award to defendant of an amount to compensate it for its attorney's fees and expenses in defending these suits.

It is not our province on appeal to weigh and evaluate the evidence, but merely to determine whether there is material, credible evidence to support the findings of the trial court. Albaugh v. Mt. Shasta Power Corp., 9 Cal. 2d 751, 773, 73 P. 2d 217; Lindemann v. San Joaquin Cotton Oil Co., 5 Cal. 2d 480, 55 P. 2d 870.

The trial court in its findings alluded to the abnormal economic conditions prevailing during the years from 1929 up to the bank holiday in 1933 and thereafter, and noted the fact that the total administration of the trusts had netted plaintiff three and nine-tenths per cent on investments on his behalf over the difficult period in question.

The general nature of the transactions to which plaintiffs take exception, in order of discussion in their briefs, are as follows:

(1) Pasadena Golf Club mortgage. Defendant bank held a $300,000 mortgage on the club property, appraised at $700,000 and valued even in February of 1933 at $555,000. It sold to the trust participation certificates in the mortgage amounting to $54,400, which totaled about four per cent of the trust, the last one being placed in the trust June 30, 1931. These and other participation certificates were issued and dealt with by the bank as permitted by the provisions of section 104 of the Bank Act (Act 652, Deering's Gen. Laws, St. 1909, p. 108), under which the bank, as trustee, could buy these certificates for the trust, buying them from the bank itself as mortgage holder. On October 26, 1932, the bank took a deed to the real property securing the mortgage in lieu of foreclosure. The participation certificates were turned over to the successor trustee. The loan was in good standing at all times when participation certificates were sold to the trust.

(2) Flintridge Golf Club mortgage. A mortgage loan in the sum of $225,000 had been made by the bank on the Flintridge property, appraised as being worth $725,000. Participation certificates were sold to the trust during 1931 and were turned over to the successor trustee.

In the case of both these golf club properties it was within the province of the trial court to consider, as defendant had, not only the appraised value of the real property but also the character, financial standing and past performance of the officers and members of the clubs. No claim is made that golf club mortgages in all cases and under all circumstances were improper investments for trust funds, and it appears that participation in a mortgage on the property of another golf club in the same community had been approved by plaintiff.

(3) H. L. Stowell mortgage. The bank loaned $30,000 to Stowell, secured by a mortgage on a two-story building on the corner of Colorado and Raymond streets in the city of Pasadena which had been appraised at $112,000. On September 25, 1928, $3,400 in trust funds were invested in participation certificates in this mortgage, which were later turned over to the successor trustee.

(4) B. O. Kendall mortgage. A loan of $35,000 secured by a mortgage on a storage warehouse appraised at $83,400 was made to Kendall by the bank in 1925. Participation certificates for $2,200 were purchased for the first trust and $800 for one of the other trusts. Interest was paid to April, 1936, but the following year the mortgage was foreclosed, was bought in by the bank and has been managed by it since that date.

(5) John T. Young mortgage. In November, 1928, the bank loaned Young $20,000 to build a motion picture theater and store building on Eagle Rock boulevard in Los Angeles, three or four blocks from the Eagle Rock business district. When completed the property was valued at $40,000. A participation certificate for $2,500 was sold to the trust and is still held by the successor trustee, although November, 1938, it had been reduced to $1,532.22.

(6) Bennett Investment Company mortgage. In September of 1928 the bank loaned $60,000 to the Bennett company, secured by a mortgage on a partly planted citrus ranch in San Diego county appraised at $124,000. Participation certificates were sold to the trust to the extent of $2,800 and were delivered to the successor trustee.

(7) Ethel M. Dennis mortgage. In June, 1930, the bank loaned $15,000, secured by a mortgage on a two-story Class C building on West Colorado street in Pasadena, appraised at $37,000. In March, 1931, a participation certificate for $2,500 was sold to the trust and is now held by the successor trustee.

(8) T. S. UpdeGraff mortgage. In June of 1924 the bank loaned $42,500, secured by a mortgage, on a four-story and basement building

on South Main street in Los Angeles occupied by the Army and Navy Store and appraised at $119,000. In August, 1928, participation certificates for $3,100 were sold to the trust and are now held by the successor trustee.

(9) William H. Bennett mortgage. In March, 1929, the bank loaned $25,000, secured by a mortgage on a two-story Class C building on Santa Monica boulevard in Los Angeles, appraised at $48,500 and yielding an annual income of $9,600. In September of 1931 a participation certificate for $1,000 was purchased for the trust and later was delivered to the successor trustee. Plaintiff's assertion that in July, 1938, this loan was finally liquidated with a relatively small loss does not affect the issues now before us.

(10) Chares A. Davey mortgage. In August, 1929, the bank loaned $5,000 on a duplex house and garage appraised at $10,150 and later sold the mortgage to the trust. It passed to the successor trustee, who foreclosed the mortgage, bought in the property and took a deficiency judgment which was fully satisfied.

(11) John R. Lee mortgage. In March, 1928, following an introduction by plaintiff, $15,000 was loaned at seven per cent on vacant property in Pasadena appraised at $30,000. Before the termination of the trust, title to the property was taken in lieu of foreclosure and this was later transferred to the successor trustee.

(12) Powers and Durston mortgage. In May, 1929, a loan of $3,500 was made out of the trust funds upon a double residence appraised at $7,125. The mortgage was foreclosed prior to the termination of the trust and title to the property later transferred to the successor trustee.

(13) C. Kern Fiedler mortgage. In June, 1928, the bank loaned $5,000, secured by a mortgage on vacant property on South Broadway in Pasadena and located in the "heavy industrial zone," appraised at $9,500. A year later the bank sold the mortgage to the trust. It was later reduced to $4,000 and was transferred to the successor trustee, who foreclosed it and bid it in for the full amount.

(14) Bastanchury Ranch Company bonds. In February, 1928, the bank bought for the trust $4,950 worth of bonds. On appeal the purchase of these bonds is not attacked, but their retention after June, 1930, is declared to have been improper. The total issue of bonds was $1,500,000, supported by property then appraised at $4,235,000. The trust deed was later foreclosed, a new corporation was formed and stock issued to former bondholders. This stock at the time of trial was held by the successor trustee.

(15) Central Oakland Block bonds. From November, 1928, to October, 1929, these bonds of a value of $11,955 were purchased for the trust. There was an issue of $1,500,000 of bonds, supported by an appraisal of $2,577,000 on property securing it. Plaintiff complains

of the failure of defendant to sell the bonds after November of 1931, when it disposed of them at a loss.

In connection with the two latter transactions involving bonds, it should be borne in mind that "there is no rule of law which compels the Court to hold that an honest trustee is liable to make good loss sustained by retaining an authorized security in a falling market, if he did so honestly and prudently, in the belief that it was the best course to take in the interest of all parties." In re Clark's Will, 257 N. Y. 132, 177 N. E. 397, 398, 77 A. L. R. 499.

The trial court found that defendant had furnished plaintiff with frequent statements of receipts and disbursements and statements of investments on hand in said trust, and any and all other information requested by plaintiff pertaining thereto. The court further found that plaintiff, with full knowledge thereof, acquiesced in the transactions, speculated on the outcome of the depression and then chose to retain the benefits of investments of the same character costing over a million dollars, to attack those here in question and to seek to throw upon defendant all of the burden of his losses; that decrease in value of certain investments "was proximately caused by the then existing economic depression and not by the character of said investments or any negligence of defendant." "Whether the trustee has acted properly in making an investment depends upon the circumstances at the time when the investment is made and not upon subsequent events." Restatement of the Law of Trusts, sec. 227, sub. m; In re Clark's Will, supra. "In making investments not only is the trustee under a duty to use due care and skill, but he must use the caution of a prudent man. In the absence of provisions in the terms of the trust or statutory provisions the investments which a trustee can properly make are those which a prudent man would make in investing his property outside of ordinary business risks and with a view to the safety of the principal and to the securing of an income reasonable in amount and payable with regularity." Restatement of the Law of Trusts, sec. 227, sub. e. The court found that in its dealings on behalf of the trust defendant "exercised its best judgment, which was a careful judgment, and that it also exercised reasonable care such as an ordinarily prudent person takes with respect to his own affairs and which such an ordinarily prudent person, whether individual or trust company, performing the same trust functions as defendant and under the same conditions, would have exercised with respect to said and each of said matters." These findings are adequately supported by the evidence.

Plaintiff was a sagacious business man, interested in the profitable administration of the trust by defendant. The original trust agreement reserved to him the right to direct it in making investments, and required advance notice of intended sales or reinvestments. This last

requirement was not fully observed by the parties, and on August 23, 1930, they amended the trust agreement to read as follows: "The trustor reserves the right to direct the trustee in writing as to the sale, investment and/or reinvestment of all or any part of the corpus or principal of the trust estate. The trustee shall be fully protected in following such directions when received by it, but shall not be required to ask for or demand such directions in any case, which in the judgment of the trustee requires the sale, investment or reinvestment of all or any part of the trust estate. In making investments for the trust estate the trustee shall not be restricted to securities of the character authorized by the laws of the state of California for trust investments."

This is not the case of a beneficiary who is a helpless infant or an incompetent, nor even one unversed in the intricacies of business administration, but is one of an experienced and resourceful man of mature years. It may have been an indication of his emphasis on enhancing the value of the trust rather than on elements of extraordinary security that he voluntarily, after two and a half years relationship with defendant acting as trustee, undertook to remove any restriction imposed by law as to the character of the investments to be made out of trust funds. But nearly two years thereafter, and from June, 1932, to December, 1933, perhaps due to misgivings of plaintiff as to the outcome of the severe economic readjustment which was taking place, relations between plaintiff and defendant were less amicable, and culminated in the termination of the trust in the latter month. Then by voluntary agreement of the parties in December, 1933, after the passing of this year and a half in which plaintiff knew that a critical analysis of the body of the trust was necessary and proper, an accounting between the parties was had, a reduced fee for services as trustee was accepted by defendant and any action for alleged negligence prior to that time was deferred for a period of three years. All of this shed light on the conduct of defendant and aided the trial court in reaching a conclusion as to the relationship of the parties in the administration of the trust. Defendant of course does not contend that it would have been justified in negligently administering the trust merely because of silent acquiescence of plaintiff in ill-advised investments; but it is obvious that the knowledge and experience of plaintiff made it inevitable that his views as to properties, persons and trends, even when casually imparted, would merit and receive appropriate consideration by defendant together with advice, recommendations and information from other sources.

In People's State Bank & Trust Co. v. Wade, 269 Ky. 89, 106 S. W. 2d 74, 75, it is said: "The two usual purposes for the creation of a trust are (1) to preserve the property intact, and (2) to earn an income for the beneficiary. In either event, the purpose of setting up a trustee to administer a fund or estate is to substitute the supposedly

superior judgment of the trustee for that of the beneficiary. It is not expected that the trustee shall 'bury his talents,' nor is the law such a hard master as to require that he exercise an infallible judgment in the investment of funds entrusted to his care. He must exercise the skill and judgment of a reasonably prudent businessman in preserving the estate, but at the same time make the estate productive." Among matters which a trustee should consider are the aggregate value of the trust estate, the nature of his other investments on its behalf and the advisability of diversifying his investments in order to insure against adverse conditions in any particular field. Restatement of the law of Trusts, vol. 1, sec. 227, sub. m.

In the case of In re Westfield Trust Co., 117 N. J. Eq. 429, 176 A. 101, 103, the court said: "The treacherous path that lay before the investor, whether trustee or otherwise, in the spring and summer of 1931 . . . is apparent when, with the advantage of retrospection, we look upon the debacle that ensued. Favored forms of trust investment were sucked into the maelstrom—mortgage investments, corporate bonds, and even cash in bank. Following, came the widespread apprehension of money inflation in company with which was the doctrine, well received even in conservative circles, that participation in ownership equities was extremely desirable because of its proportionate share in the potential inflation of capital and earnings. However loudly it may now be said that people should have foreseen, most men of that degree of prudence and caution that we call ordinary did not foresee." In this case, as in the case of In re Heyl's Estate, 331 Pa. 202, 200 A. 617, 618, 117 A. L. R. 867, "it is easy now in view of the happenings to values in the past eight years, to conclude that the appraisements placed upon the properties are too high, measured by today's market price, but no one had the prescience and judgment at the time these loans were made to forecast the conditions which exist today."

We deem it unnecessary to review the evidence which warrants the conclusion that defendant considered not only the appraised value of the various properties but also the character, business record and financial resources of those with whom it was dealing. A financial institution with broad general knowledge of community needs and trends, of the character and worth of its citizens with whom it has dealt and specific knowledge of property values in that community, may include in its considerations such positive general knowledge, and it is not restricted to letter upon letter and line upon line conformity with a prescribed ritual in estimating the value of a proposed investment in order to avoid a charge of negligently managing funds under its control. It was the province of the trial court to weigh and evaluate the evidence, and it reached a conclusion, on adequate proof, which is adverse to plaintiff's contentions and which is set out in the findings above quoted.

A discussion of the question of laches on the part of plaintiff appears needless in view of our determination that the court's findings that defendant was not negligent are supported by the evidence.

Nor does it appear that plaintiff's resistance to the trial court's award of attorney's fees and court costs to defendant is well founded. The trust agreement provided that the trustee should be indemnified for costs incurred by it in connection with the trust. While it is true that the principal obligations of the trust terminated by agreement of the parties in December, 1933, it was expressly provided that certain aspects of that relationship should survive and it is in reliance upon that provision that this suit was brought. It was a just and reasonable construction of the agreement by the trial court that defendant should not be made to suffer loss at the hands of any person, least of all the plaintiff, in properly defending acts done for the benefit of plaintiff in the administration of the trust. See Ellis v. Kelsey, 241 N. Y. 374, 150 N. E. 148.

LIABILITY OF STOCKHOLDER ESTABLISHED BY STATUTE

Reconstruction Finance Corporation v. Pelts, United States Circuit Court of Appeals, Seventh Circuit, 123 Fed. Rep. (2d) 503

The liability of a stockholder in an insolvent banking corporation does not attach through any relation of principal and agent, but attaches by force of statute to one who is a stockholder, and it is the status of stockholder that fixes the liability.

In this case plaintiff, in a creditor's action against stockholders in insolvent banking corporation, obtained a judgment against a registered owner of stock for added liability imposed upon stockholders by Illinois constitution and statutes. Plaintiff thereafter ascertained that defendant was the real owner of the stock and had employed attorneys to defend action against registered owner. It was held that plaintiff was entitled to judgment against defendant, notwithstanding judgment against registered owner, although there could be only one satisfaction; the relationship between defendant and registered owner being a trustee and beneficiary relationship.

Action by the Reconstruction Finance Corporation, a corporation of the United States created by act of Congress, against Philip W. Pelts, wherein plaintiff, as a creditor of an insolvent banking corporation, sought to enforce the stockholders' liability of those who held stock in

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NOTE — For similar decisions see Banking Law Journal Digest (Fifth Edition) §1440.

the insolvent corporation. From a judgment for plaintiff, defendant appeals.

Affirmed.

Meyer Abrams, of Chicago, Ill., for appellant.

Lee Walker, M. O. Hoel, and John M. Crimmins, all of Chicago, Ill., for appellee.

MINTON, C. J.—The Reconstruction Finance Corporation was a large creditor of the Central Republic Trust Company, an insolvent banking corporation, and brought a creditor's bill against the stockholders of the bank to enforce their added liability on said stock.

The original complaint was filed November 19, 1934, in which it was alleged that Edith Levinson was the owner of twenty-four shares of the bank's stock at the times the Reconstruction Finance Corporation extended its credit to the bank. Philip W. Pelts was made a party by amendment filed on September 20, 1935, in which it was alleged that he was the owner of record of 15/165 shares of stock of said bank. On May 1, 1937, judgment for $2,400 was taken against Edith Levinson as the registered owner of said stock. On April 12, 1940, a judgment was entered against the appellant, Pelts, as the owner of the fractional share, in the sum of $9.09.

The Reconstruction Finance Corporation discovered that Pelts was the real owner of the twenty-four shares of stock, shown on the records of the bank in the name of Edith Levinson, and for which judgment had been taken against Edith Levinson, and that Pelts had employed lawyers to conduct Edith Levinson's defense to the suit brought to enforce her liability as the owner of said stock. At the time judgment was taken against Edith Levinson, and at the time judgment was taken against Pelts as owner of the fractional share, the court reserved jurisdiction in these words:

"... this decree shall be without prejudice to any future hearing or proceeding in this cause, ... against any or all persons who may be liable in any manner on account of shares of stock of said bank, ... which any person at any time owns ... for the purpose of any such future hearing or proceeding in this cause this Court expressly retains jurisdiction of this cause.

"Plaintiff, with leave of this Court, may amend and supplement its bill of complaint or file such other pleadings in this cause as may be necessary, at any time hereafter, against any of the defendants in this cause or against any other persons referred to in this paragraph. ..."

On April 9, 1940, by leave of court, the Reconstruction Finance Corporation amended its bill by alleging liability of Philip W. Pelts as the real owner of the twenty-four shares of stock in the said bank that appeared on record in Edith Levinson's name, and on which apparent liability the judgment had been entered against Edith Levinson, and

also filed a supplemental complaint alleging that appellant, Pelts, had furnished lawyers to defend the suit against Edith Levinson, and praying judgment against Pelts for $2,400 and interest from the date judgment was taken against Edith Levinson, which was May 1, 1937.

On March 6, 1941, the court gave judgment against Pelts, as the real owner of said stock, in the sum of $2,400, with interest at 5 per cent from May 1, 1937. From this judgment, Pelts appealed.

Counsel for appellant at the argument of this case, with a candor that did him much credit, stated that there was only one question in this case, and that was whether there could be at the same time a judgment against the record owner and the beneficial owner of bank stock for the added liability imposed upon the stockholder by the statutes and Constitution of Illinois. He frankly admitted that this court had in Ericson v. Slomer, 94 F. 2d 437, decided this question against the appellant, and he asked us to reverse our holding in that case.

The appellant has cited and relies upon Hospelhorn v. Poe, 174 Md. 242, 198 A. 582, 118 A. L. R. 682. This case holds that the relation of the undisclosed principal and agent exists between parties where one holds in his name the bank stock of another and that in this relationship, the liability is not joint and several but alternative, and that before judgment, where the principal and agent are sued together, an election must be had as to whom the judgment is to be taken against, and if a judgment has been taken against one, it is a bar to suit against the other.

The liability of the stockholder does not attach any is not worked out through any relation of principal and agent, but it attaches by force of the statute to one who is the stockholder. Gahagan v. Whitney, 359 Ill. 419, 194 N. E. 581. It is the status of stockholder that fixes the liability. There is no dispute that Pelts was the real owner. If he was the real owner, he was liable as stockholder, and the fact that a judgment had theretofore been taken against the record owner was no bar to a judgment against the real owner. Even though there may be two judgments, there can be only one satisfaction.

The Maryland case rests upon the relationship of undisclosed principal and agent. The Ericson case decided by this court relies upon Chapman v. Pettus, Tex. Civ. App. 1925, 269 S. W. 268, in which the Texas Court finds the relationship to be one of trustee and cestui que trust, and in this relationship finds it possible to work out the liabilities between the parties equitably, and at the same time save the creditors of the bank from the peril of electing the person they shall pursue.

We think the relationship is more accurately designated as trustee and cestui que trust, which enables the Court to reach the very satisfactory and equitable result reached in Ericson v. Slomer, 7 Cir., 94 F. 2d 437. We are satisfied with the law there laid down, and reaffirm it.

The appellant insists that he should not be liable for interest from

May 1, 1937, the date of the judgment against Edith Levinson, but only from March 6, 1941, the date judgment was entered against him. It has often been held that equity may allow interest in a proper case, though no statute or contract provides for it. Golden v. Cervenka, 278 Ill. 409-433, 116 N. E. 273; Thompson v. Davis, 297 Ill. 11-21, 130 N. E. 455; Duncan v. Dazey, 318 Ill. 500-527, 149 N. E. 495.

The appellant knew he was the real owner of the stock in question, and that the liability was his. Nevertheless, he provided attorneys to defend Edith Levinson's case, and stood by and saw judgment go against her, when he knew it was his liability. It may be true that he was under no duty to speak up and assume that liability. He committed no legal offense when he kept still and let judgment go against Edith Levinson, when he knew that it ought to have been against him; but he is certainly in no position to complain when he is discovered, or to ask a court of equity not to charge him with interest.

We think it was a proper case for a court of equity to exact interest.

SUFFICIENT CONSIDERATION FOR PROMISSORY NOTES

Blair v. Smylie, Court of Civil Appeals of Texas, 155 S. W. Rep. (2d) 958

The maker of two promissory notes borrowed bearer bonds from the payee to use in borrowing money. The maker then cashed the bonds, rendering their return impossible. It was held that the notes were not shown to be illegal, even if the bonds had been stolen by some one prior to coming into payee's posession, because neither the payee nor the maker knew they were stolen.

Action by W. R. Smylie against Guy L. Blair and another, executors of the estate of Dr. J. M. Blair, deceased, on two promissory notes. From a judgment for plaintiff, defendants appeal.

Affirmed.

W. P. Hamblen, W. P. Hamblen, Jr., and Philip Tharp, all of Houston, for appellants.

A. Milton Vance, Lewis Fisher, and Sam Holiday, all of Houston, for appellee.

GRAVES, J.—This much of the statement of the nature and result of the suit—considered to be substantially correct—is taken from the appellee's brief:

NOTE — For similar decisions see Banking Law Journal Digest (Fifth Edition) §§347, 348.

"This was a suit by W. R. Smylie against the executors of the estate of Dr. J. M. Blair, deceased, on two promissory notes, each dated February 20, 1932, each due five years after date and bearing interest at six per cent per annum from date until paid; Note No. 1 being in the principal amount of $7,000.00 and Note No. 2 being in the principal amount of $6,500.00. The pleaded defenses were (1) that the notes were without consideration, (2) that the consideration for the notes was illegal, (3) that the notes were forged.

"By supplemental petition plaintiff pleaded the agreement regarding certain bonds which is more particularly described hereinbelow, pleaded the estoppel of Dr. Blair's executors to deny the title of Smylie to the bonds and pleaded that Smylie acquired title to the bonds by gift and by the two year statute of limitation.

"No effort was made by the defendants to substantiate the sworn plea of forgery. . . .

"On February 13, 1932, Dr. Blair and Mr. Smylie entered into a written contract the execution of which each acknowledged before B. W. Lakenmacher, a notary, who was a vice-president of Houston National Bank. It recited that Smylie owned bearer Liberty Bonds of the face value of $13,500.00 and bearing 4¼% interest, and Blair owned certain lands in Terry County, Texas; that Blair was in a position to make a loan using the bonds as security and 'has arranged with the First Party to use the above described bonds in securing said loan under the terms hereinafter set forth'; it provided that Blair should execute and deliver to Smylie his 6% notes for $13,500.00, due five years after date, secured by a deed of trust on the Terry County lands, and Smylie should deliver to Blair the bonds and permit their use as collateral by Blair for a period not to exceed five years. Smylie was to retain the interest-coupons and as he cashed them was to credit the proceeds to interest accruing on the notes.

"The contract further provided:

" 'Fourth: On or before Five (5) years after date of said notes, the Second Party agrees to return to the First Party the government bonds and at such time as the bonds are returned, to pay to the First Party a sum of money equivalent to One and Three Quarters (-1-¾%) per cent from date of notes until date returned.

" 'Fifth: At such time as the government bonds are returned to the First Party, the notes, together with the deed of trust herein provided, shall become null and void and without force and First Party agrees to release the Second Party from the obligations therein assumed.

" 'Sixth: If for any reason Second Party fails to return the government bonds to the First Party on or before maturity date of notes, First Party has the right to proceed to collect the amount due under the terms of the notes and deed of trust herein provided.

" 'Seventh: The Second Party agrees and binds himself, his heirs, administrators, and assigns, to fully indemnify and save harmless the First Party against any and all loss of every nature whatsoever, including suits, court costs, and attorney's fees, as a result of the use of the government bonds for collateral as provided in this agreement.'

"Pursuant to this contract Smylie delivered to Blair the described negotiable bearer bonds of the face value of $13,500.00. He did not de-

tach the coupons as provided by the contract, but delivered the bonds with the coupons attached. Blair delivered to Smylie his notes for $13,500.00 as provided by the contract, and the deed of trust on the Terry County land. By agreement, Smylie did not record the deed of trust.

"Blair cashed the bonds, thus rendering it impossible for him to return them to Smylie. They were redeemed by the U. S. Treasury. There is no evidence that any third party ever asserted any claim to them. Blair paid Smylie interest upon the notes, the last payment being $700.00 on August 28, 1936.

"The notes matured February 20, 1937. Smylie called at Blair's home to collect them, but Blair was seriously ill and Smylie was unable to see him. Blair died April 2, 1937.

"Just prior to Dr. Blair's death, to-wit: on January 2, 1937, Dr. Blair conveyed the Terry County lands to his brother, Guy L. Blair, for a recital consideration of $4,000.00 cash. Guy Blair testified that the actual consideration was his cancellation of a debt of $4,273.00 previously owing him by Dr. Blair. On February 15, 1937, Guy Blair sold the land to Joe Johnson for $12,000.00, all of which Johnson had paid at the time of the trial. Since Johnson was thus an innocent purchaser, Smylie did not seek to foreclose the deed of trust in this suit. When Smylie learned, after Dr. Blair's death, of the conveyance of this land, he recorded his deed of trust, on advice of counsel.

"After Blair's death Smylie caused the notes to be presented to the executors for payment, and same being refused, brought this suit.

"Trial was to a jury, who found that a preponderance of the evidence showed:

"1. The bonds were delivered to Smylie by one Ferrara on June 22, 1926.

"2. When he delivered them, Ferrara told Smylie that the bonds were to belong to Smylie if Ferrara did not return for them.

"3. The bonds, when so delivered, were stolen property.

"4. Smylie did not know the bonds were stolen property.

"5. Ferrara never returned to demand the return of the bonds.

"6. A reasonable time within which to demand the return of the bonds elapsed.

"7. Dr. Blair executed the contract with Smylie dated February 13, 1932.

"8. Dr. Blair executed the two notes sued on.

"9. Smylie delivered the bonds to Dr. Blair after execution of the contract.

"10. Dr. Blair did not know the bonds were stolen at the time they were delivered to him.

"Upon receipt of this verdict the defendants moved the court to enter judgment in their favor. They did not move for judgment notwithstanding the verdict.

"The plaintiff, upon receipt of the verdict, filed a motion for judgment non obstante, on the theory that the finding of the jury (special Issue No. 3) that the bonds were stolen, was not supported by any evidence. This motion was overruled, to which plaintiff excepted, and to this action of the trial court appellee has cross-assigned error here. Subject to the said motion, the plaintiff filed a motion for judgment on the verdict, which the trial court granted."

Appellants' sole propositions for reversal, in his verbis, are these:

"1. The jury having found that the bonds which plaintiff claims he delivered to J. M. Blair were stolen property, plaintiff could not recover therefor.

"2. The bonds, being stolen property, even if delivered to J. M. Blair, could not constitute consideration for the notes sued on.

"The undisputed proof, by plaintiff himself, being that plaintiff believed the bonds were stolen at the time he received them from Ferrara, and that he concealed the bonds until the alleged delivery to Blair, there could be no valid or valuable consideration for the notes sued on.

"3. The undisputed proof by plaintiff himself being that he received the bonds from Ferrara, who was admittedly fleeing from the law and who stated that he had to get rid of the bonds, the appearance and actions of Ferrara being that of a common tramp or bum, and the inadequacy of the amount given by plaintiff to Ferrara ($104.00 for $13,500.00 of United States Bonds), the fear of plaintiff to cash the interest coupons on the bonds, and the concealment of the bonds, are such evidence of guilty possession of the bonds, both by Ferrara and Smylie, that Smylie should not be permitted to profit thereby and recover judgment herein.

"4. It is contrary to public policy that Smylie, under the admitted facts, should be permitted to profit by his illegal acts, and fraud.

"5. Public policy prohibits the encouragement of theft and the concealment and disposition of stolen property, as the admitted facts show was done in this case.

"6. Plaintiff's proof showing that his purpose in making the alleged trade with Blair was so that he could get value on property which he believed was stolen so taints the transaction with illegality as to bar any recovery by plaintiff.

"7. The judgment of the trial court under the facts in this case is contrary to law, good morals, public policy and common honesty.

"8. A contract based on an agreement to dispose of property which both parties thought was stolen, is contrary to public policy and void.

"9. There was no issue of fact to be submitted to the jury, plaintiff's own testimony being that he thought the bonds were stolen, he thought Ferrara, from whom he obtained the bonds, was a guilty possessor thereof, and his purpose in making a deal with Blair was to get value on property which he thought was stolen and which he had concealed.

"10. The court should have submitted the issue of illegal contract."

In the state of this record, none of these presentments can be sustained; the rationale of them all plainly reflects their underlying theory upon the whole case—indeed, the appellants themselves so say in their brief—to be that a finding by the jury simply that these bonds were stolen property, as was made under special issue No. 3, constituted a complete defense to the suit on these two notes, regardless of the other attending circumstances. Consequently, they requested the submission of no issues by the trial court beyond those that were submitted; they

did not except to the court's charge for failure to submit any issue; they did not make the failure to submit an issue a ground of their motion for new trial; they have not assigned error in this court to the failure of the trial court to submit any special issues; and, finally, they have not filed on the appeal any assignments by which they claim that any one of the quoted findings of the jury is without support in the evidence.

As against that position, as so grounded, the opposing contentions of the appellee are by him succinctly summarized as follows: "(1) There was no evidence that the bonds were stolen, (2) it is immaterial to the rights of the parties, even if they were in fact at some time in their history stolen, since there is no finding of facts which would make their possession by Ferrara, Smylie, or Blair, an illegal possession, (3) since Dr. Blair was a bailee of the bonds, his personal representatives are not in a position to deny the title of Smylie, the bailor, to the bailed property."

This court agrees with that answering position of the appellee, with the exception that it does not pass upon the first recitation of there being no evidence that the bonds were stolen, since it deems that an immaterial issue, hence an inconclusive finding, under other established facts of the case; presumably, from the judgment it rendered in favor of the appellee, the trial court also deemed the finding under that issue a non-controlling one.

Since appellants so stake their whole case upon their theory that a finding by the jury that the bonds had been stolen property would be a complete defense against the notes, regardless of other attending conditions, and, in reliance upon it, requested the submission of no other theory to the jury, it seems inept to yet contend upon the appeal that further unspecified issues of fact, seeking to elicit in some way whether or not the contract between Smylie and Blair had been an illegal one, should have been given. Plainly they waived any such additional issues. R. S. Article 2190, Vernon's Ann. Civ. St. art. 2190; Wichita Falls & O. Ry. Co. v. Pepper, 134 Tex. 360, 135 S. W. 2d 79.

Neither are they in position to complain of any of the facts found under the other issues submitted, because the record is devoid of any objections thereto from them.

This court holds, in the other attending circumstances—aside from the bare finding that the bonds were stolen—which must thus be regarded as the established facts:

1. That the notes sued upon were not shown to be illegal, even if they had been stolen by some one prior to coming into appellee's possession, because neither Smylie nor Blair knew of that fact. 8 Am. Jur. 730; Castleberry v. State, 35 Tex. Cr. R. 382, 33 S. W. 875, 60 Am. St. Rep. 53; 9 C. J. 63; 11 C. J. S., Bonds, § 87, p. 457; 17 C. J. S.,

Contracts, § 190, p. 545; Day v. Mallard, Tex. Com. App., 228 S. W. 164; Illies v. Fitzgerald, 11 Tex. 417; Ireland v. Craggs, 5 Cir., 56 F. 2d 785; Murray v. Lardner, 2 Wall. 110, 17 L. Ed. 857; Missouri, K. & T. Ry. Co. v. Carter, 95 Tex. 461, 476, 68 S. W. 159; P. C. 1925, Art. 1430; State of Montana v. Gateway Mortuaries, Inc., 87 Mont. 225, 287 P. 156, 68 A. L. R. 1512; St. Regis Candies v. Hovas, 117 Tex. 313, 3 S. W. 2d 429, 433; Twin City Pipe Line Co. v. Harding Glass Co., 283 U. S. 353, 51 S. Ct. 476, 75 L. Ed. 1112, 83 A. L. R. 1168; 36 Tex. Jur. 342; 10 Tex. Jur. 191; Williston, "The Law of Contracts," Sec. 1631.

2. That the contract between Smylie and Blair was not shown to have been void for illegality, although the bonds may have been previously stolen by some one, because, in the total absence of any evidence shown to the contrary, the presumptions of law were to the effect that Ferrara's possession of them was lawful and carried with it the right to so dispose of them to the appellee. Castleberry v. State, 35 Tex. Cr. R. 382, 33 S. W. 875, 60 Am. St. Rep. 53; 9 C. J. 121; 11 C. J. S., Bonds, § 118; 9 C. J. 63; 11 C. J. S., Bonds, § 87, p. 457; Marquez v. State, 126 Tex. Cr. R. 132, 70 S. W. 2d 426; 34 Tex. Jur. 696; 41 Tex. Jur. 215; Underhill, Criminal Evidence, Sec. 299.

3. Since appellants, as indicated supra, neither sought nor secured findings of fact showing just what the character of Ferrara's title and possession of the bonds was, as to which the burden was upon them, it should also be presumed, if necessary to support this judgment on the verdict, that the trial court additionally found Ferrara not to have stolen the bonds himself, but to have acquired them, at all events, under such circumstances as to justify the presumption of his legal title and possession thereof.

4. That, in what must so be assumed to be the established facts, Dr. Blair should be held to have been a bailee of the bonds in question, hence appellants, as his personal representatives and being in no better position than he himself would have been, were, as a matter of law, estopped to deny the title thereto to his bailor, the appellee herein. 43 A. L. R. 149, note and authorities therein cited; 6 Am. Jur. 217ff; City National Bank v. Conley, Tex. Civ. App., 228 S. W. 972; Callen v. Evans, Tex. Civ. App., 120 S. W. 543; Grooms v. Rust, 27 Tex. 231; Loya v. Bowen, Tex. Civ. App., 215 S. W. 474; Ed Maher, Inc. v. Morris, Tex. Civ. App., 67 S. W. 2d 340; 5 Tex. Jur. 1037; Texas Standard Cotton Oil Co. v. National Cotton-Oil Company, Tex. Civ. App., 40 S. W. 159.

5. That, under the other holdings herein made, the appelee's cross-assignment, in effect, claiming the finding that the bonds were stolen property when delivered by Ferrara to Smylie to be without evidence to support it, raises a mere immaterial and inconclusive issue, hence should be disregarded as such.

6. That appellants, because of the procedural omissions pointed out supra—that is, having failed to request the submission of any other issues in support of their plea of an illegal contract, and having failed to even object to the charge as given for its failure to submit any such issue—thereby effectively waived any such claim.

These conclusions require an affirmance of the appealed-from judgment; it will be so ordered.

PAYMENT OF PRIOR LOAN AND ACCRUED INTEREST OUT OF PROCEEDS OF NEW LOAN

Madison Personal Loan, Inc., v. Parker, United States Circuit Court of Appeals, Second Circuit, New York Law Journal, Vol. 107, No. 12

A borrower received a loan from a lender licensed under the New York Small Loan Act. From the sum of the loan received the borrower paid the lender the amount owed on a prior loan, including principal and accrued interest. It was held that the transaction violated the provision in the statute forbidding the compounding of interest. Consequently the loan and a chattel mortgage which was given to secure it were void.

Appeal from the District Court of the United States for the Southern District of New York.

Petition of Madison Personal Loan, Inc., for an order directing Irving Radner, bankrupt, to surrender to petitioner an automobile which had been mortgaged to it, opposed by Henry W. Parker, trustee of the bankrupt. From an order reversing the referee's order, which had granted the petition, and holding the mortgage invalid (D. C., S. D. N. Y., 36 F. Supp., 964), the petitioner appeals by permission of this court. Affirmed.

David I. Silverman (Philip Zierler on the brief) for petitioner-appellant.

Henry W. Parker (William Stephen Brown on the brief) for trustee-respondent.

Jackson R. Collins and Linn K. Twinem, amicus curiae.

CLARK, C. J.—This is an appeal by permission from an order of the District Court construing the Small Loan Act of New York Banking Law, sections 340 et seq. Appellant, Madison Personal Loan, Inc.,

NOTE—For similar decisions see Banking Law Journal Digest (Fifth Edition) §757.

petitioned for an order requiring the bankrupt to turn over an automobile which was covered by a chattel mortgage in favor of appellant. The bankrupt's trustee opposed the petition on the ground that the loan which the mortgage secured was void under the Small Loan Act. The referee granted the petition, but on petition to review the district judge reversed and upheld the trustee (36 F. Supp., 964).[1]

The facts are stipulated. On June 23, 1939, the bankrupt executed a promissory note in the amount of $287, bearing interest at the maximum rate allowed the Small Loan Act, and secured the chattel mortgage in question on the bankrupt's automobile. Of this $287 $159.20 was paid to appellant in satisfaction of a prior loan, representing $158.19 principal and $1.10 interest, and the remaining $127.71 was paid over to the bankrupt. There has been some dispute whether it is proper to infer from these facts that the $287 loan was a "renewal" or a "new" loan. In our view of the case the particular term to be applied to the transaction is immaterial. Default on the note and mortgage occurred on July 23, 1940.

The trustee relies on section 352 of the New York Banking Law in asserting that the loan by appellant is void. The section reads in part:

"No interest, consideration, or charge for the use of money shall be deducted or received in advance or compounded, and all interest, consideration and charges for the use of money shall be computed on unpaid principal balances.

". . . If any interest, consideration, or charges in excess of those permitted by this act are charged, contracted for, or received the contract of loan shall be void and the licensee shall have no right to collect or receive any principal, interest, or charges whatsoever."

These provisions of this particular section, first enacted in its present form in 1932, have not been construed by any New York court.[2] In other states, however, substantially similar provisions, all based on the uniform act drafted through the offices of the Russell Sage Foundation, have been construed as the District Court did the New York act (Frazier v. City Investment Co., 42 Ga. App., 585, 157 S. E., 102; Lanier v. Consolidated Loan & Finance Co., 47 Ga. App., 148, 170 S. E., 99, followed with approval in Nash Loan Co. v. Dixon, 181 Ga., 297,

[1] The decision below is noted with approval in 27 Va. L. Rev., 952, and 4 U. of Detroit L. J., 225, and adversely in 10 Fordham L. Rev. 311. A general survey of the subject will be found in the symposium "Combating the Loan Shark," in 8 Law & Contemp. Prob., 1-206; and compare, also, May, Small Loans, 14 Encyc. Soc. Sciences, 105.

[2] Cases involving other provisions of the section have assiduously supported the protection of borrowers against extra charges, such as for insurance. Pollack v. Madison Long Island Personal Loan Co., 176 Misc., 78, 24 N. Y. S., 2d, 950; Krulik v. Confidential Personal Loan Co., 176 Misc., 138, 26 N. Y. S., 2d, 676; McGoldrick v. Family Finance Corp'n, 174 Misc., 971, 22 N. Y. S., 2d, aff'd 262 App. Div., 720, 28 N. Y. S., 2d, 709; Stuback v. Sussman, Sup., 8 N. Y. S., 2d, 141, aff'd 256 App. Div., 903, 10 N. Y. S., 2d, 240, 281 N. Y., 719, 23 N. E., 2d, 544; Cucco v. Pacific Finance Corp'n, 259 App. Div., 1033, 20 N. Y. S., 2d, 779.

182 S. E., 23; Commonwealth v. State Loan Corp'n, 116 Pa. Super., 365, 176 A., 516; Vaughn v. Graham, 234 Mo. App., 781, 121 S. W., 2d, 222). The only case to the contrary, Rouse v. Jennings (263 Mich. 609, 249 N. W., 10), will be discussed more fully below.

Appellant presses upon us the New York cases on compounding interest decided prior to the Small Loan Act. These cases clearly hold that an agreement to pay interest on accrued interest is legal if the agreement is made after accrual and with consideration, but illegal if made in advance of accrual (Newburger-Morris Co. v. Talcott, 219 N. Y., 505, 114 N. E., 846; Young v. Hill, 67 N. Y., 162; Stewart v. Petree, 55 N. Y., 621). This distinction, appellant says, is written into the Small Loan Act through the word "compounded" in the excerpt from section 352, quoted above. This hardly seems the case. In the first place, both the Talcott and Young cases (supra) set out not to define compound interest, but to determine when compounding interest is legal. For example, in the Talcott case (supra, 219 N. Y., at p. 510) the court said: "There are times, however, when a promise to pay compound interest will be enforced, if made after simple interest has accrued." And in the Young case (supra, 67 N. Y., at p. 167) the court was even more specific: "The exacting or reserving of compound interest has not met with favor in the courts, but the right to retain it when voluntarily paid is not disputed, and a recovery of it upon express contract, made after the interest has accrued and upon a sufficient consideration, is allowed."

The problem of construing section 352 is thus changed from the question whether the Legislature enacted "compounded" as defined by the New York courts to the question whether the Legislature intended by "compounded" "illegally compounded." Stated this way, it seems highly questionable that appellant's argument is at all sound. Since the act itself denounces compounding as illegal it seems gratuitous to assume that the Legislature meant to make illegal only illegal compounding of interest. True, the illegality of compounding in New York was not usurious, but only contrary to public policy (Stewart v. Petree, supra), and thus the penalty was refusal to allow recovery of the additional interest (Young v. Hill, supra), not avoidance of the entire obligation under the general usury statute (New York General Business Law, sec. 373; Sabine v. Paine, 223 N. Y., 401, 119 N. E., 849, 5 A. L. R., 1444). But to rely on this is to make all the more finely spun the distinction thus attributed to the Legislature.

Furthermore, the Legislature enacted the law in its present form in 1932 approximately as the fifth draft of the Uniform Small Loan Law (Hubachek, Annotations on Small Loan Laws, 1938, 222). If the Legislature had any specific intent with reference to "compounded" it probably meant to use the word in a manner more or less common to

all states, for it was enacting a uniform law. Certainly the drafters of the Uniform Small Loan Law could hardly have meant any more than that "compounding" simply means interest on interest (see 33 C. J., 179; 30 Am. Jur. 6). Otherwise they invited confusion. "There is a wilderness of authority on this subject. Decisions may be found taking almost any view of the question" (Palm v. Fancher, 93 Miss., 785, 790, 48 So., 818). If any sense is to be given to "compounded" in the Uniform Small Loan Law it must be to take it as a commonly accepted term, not with a complicated gloss for each state's peculiar rules of legal and illegal compounding of interest.

Support to this view is lent by the further provision of section 352 of the New York Banking Law, that interest "shall be computed on unpaid principal balances." If we construe "compounded" to mean illegally compounded under the Young and Talcott cases (supra) we run counter to this requirement that interest shall be computed only on principal. Even if the word "compounded" were omitted from the statute the addition of interest to principal in forming new principal would be denounced by the remaining part of the section. This is made stronger by noting that the first and fourth drafts said that interest should be computed only on "unpaid balances," whereas the fifth draft, the source of the New York act, and the current sixth draft say "unpaid principal balances." The changes in the section on interest, we are told, were designed to make "more clear the prohibition of additional charges beyond the authorized interest" (Gallert, Hilborn and May, Small Loan Legislation, 1932, 97).[3] Considering the source of the New York statute, it is only fair to assume that the Legislature intended to do just what the act says—prohibit any interest beyond that specifically provided for.

This fits in with the major purpose of small loan acts and the general history of this type of remedial legislation.

It was long recognized that the constriction of usury statutes encouraged loan sharks who preyed on poor and illiterate citizens in need of small sums of cash. The charges made by these unscrupulous agencies were fantastically high, and recognized as a source of untold misery among people with a precarious economic status. The drive to remedy this proceeded on the assumption that honest capital could engage in the small loan business only if guaranteed a fair return. This, it was found, amounted to from 2 to 3½ per cent. a month interest. Accordingly, considerable effort was expended, principally by the Russell Sage Foundation and bona fide small loan companies, to induce legislatures

[3] The first, fourth and sixth drafts are reprinted in Hubachek, Annotations on Small Loan Laws, 1938, Appendices A-C; the fifth draft is in Gallert, Hilborn and May, Small Loan Legislation, 1932, Appendix. In this connection it may be noted that all the courts which have ruled against compounding were construing statutes which had the somewhat less definite "unpaid balances."

to legalize small loan businesses under strict supervision. In this way an economic need—short-term financing for people not in possession of standard credit ratings—could be met, yet unscrupulous preying on unsuspecting people eliminated. If this legislation is to succeed, all devices by which additional charges can be made must be scotched. The entire problem of small loans can be better solved by frontal attacks than by flanking infiltration. If 3 or 3½ per cent. is too small to guarantee a fair return, adjustments can be made directly. Otherwise, small enhancements of return may be abused and the value of the privilege of a high return lost through loan sharks coming to the fore, dressed in respectable clothes.

It is admitted, however, that appellant here is a bona fide small loan company, and we do not mean to imply that it in any way intentionally seeks to flout the New York statute. It is equally obvious that this case is not one of abuse; the interest added to principal is only $1.10 out of a total of $158.19. But the fact remains that if this transaction is legal, others less bona fide will also be legal. Interest at 3 per cent. a month soon becomes substantial, and constant renewal of the loans would increase the principal until the interest on the original principal would reach the proportions formerly found when only loan sharks operated. Loopholes in statutes are best closed by complete closing. Halfway measures are dangerous. Since the Russell Sage Foundation and others interested in the legislation appear to have recognized these loopholes and by constant revision sought to close them completely, it ill befits a court to reopen them by attenuated reasoning based on cases decided under entirely different circumstances. This is particularly true where, as here, it is difficult to imagine any way to alter the wording of section 352 of the New York Banking Law in order to make clearer the point that interest on interest is not to be charged.

We fall back, therefore, on the cases originally cited above which support our view. Appellant stresses the fact, however, that all these cases are from intermediate appellate courts, whereas the only final word is contrary to our view (Rouse v. Jennings, supra). In any event, for the reasons discussed above, we might decline to accept this case. But apart from this, there are two important distinctions in the Michigan case. For one thing, the court observed that a Michigan statute passed in 1869 specifically allowed interest on interest from the due date, provided it was not in excess of the legal rate and was supported by an express agreement. This statute, the court implied, remained in force along with the Small Loan Act. Furthermore, in the Michigan loan the original interest was 3½ per cent., but the interest on interest was only 7 per cent. per annum. Clearly this is subject to less abuse than the allowance of 3 per cent. per month on 3 per cent. per month.

In any event, such an anomalous situation of superficially conflicting statutes does not exist in New York. At best it is a conflict between a common-law rule and a remedial statute.

Appellant also seeks to distinguish between a renewal of a loan with interest added and a new loan, part of the proceeds of which are used to pay off the old loan and accrued interest. To recognize this distinction would be to leave another loophole. For a loan company could then avoid penalty by paying over to the borrower some nominal sum, say 10 cents, and adding it to the principal. It is also urged that the old loan had to be canceled before a new one could be made. (New York Banking Law, sec. 352, forbidding a licensed loan company from permitting a borrower "to be indebted to [it] under more than one contract of loan at the same time.") But it is surely reasoning in reverse to say that, therefore, when fresh money is added the old loan is automatically canceled. This prohibition, if read quite literally, may perhaps mean that a loan company will simply have to forego an increased loan to a current borrower. Perhaps, however, it does not go so far as to forbid a loan company from making a new loan and either leaving the interest on the old loan an outstanding debt not bearing interest or allowing the borrower to discharge the interest out of his own pocket. Questions as to this provision are not before us; we indicate the possibilities involved merely to point out that it must be dealt with on its own merits. Certainly we should not construe the compounding clause loosely in order to enable a loan company to avoid a difficulty in the interpretation of another provision. And by indicating these possibilities we are, of course, not suggesting their use; a loan company is undoubtedly best advised to move cautiously along these lines and to exercise the utmost good faith. Otherwise it may well be suspected of making only a strategic retreat while it perfects a new device to avoid the force of the statute.

INVESTMENT BY TRUSTEE UNDER PROVISION IN WILL

In re Goebel's Estate, Surrogate's Court, 31 N. Y. Supp. (2d) 7

By the terms of a trust the trustee may be restricted to classes of investments narrower than those in which he would otherwise be permitted to invest. In such a case the trustee commits a breach of trust if he invests in securities not permitted by the terms of the

NOTE — For similar decisions see Banking Law Journal Digest (Fifth Edition) §§508, 513.

trust although they would otherwise be proper trust investments; and he can be surcharged for any loss that ensues.

A provision of a will authorized the testamentary trustees to invest the trust estate in bonds secured by first mortgages on realty in a certain borough of New York or to invest the same or any part thereof in the same securities as savings banks are authorized by law to invest, always having paramount regard to the safety of said investments. It was held that the trustees were not empowered to invest the trust funds in guaranteed certificates of interest in mortgage or realty located elsewhere than the borough specified by the will. The clause in the will, permitting the trustees to invest the funds in securities wherein savings banks are authorized by law, did not justify investment thereof in guaranteed mortgage certificates not included in investments authorized by will.

Proceeding for accounting by trustees under the will of Julius Goebel, deceased.

Decree settling account.

Mandelbaum Brothers, of New York City, for Anna M. Goebel and others, surviving trustees.

Greene & Greene, of New York City (Thurston Greene, of New York City, of counsel), for petitioners Marie Louise Goebel and A. Mandelbaum.

Harry J. Ahlheim, of New York City, special guardian.

FOLEY, S.—The principal issue raised in this accounting proceeding involves the objection of the special guardian of the infant remainderman to an investment made by the trustees in guaranteed mortgage certificates. It is claimed that the investment violated the terms of the will and the restrictions placed upon the class of permissible securities and imposed by the testator upon his trustees. The objection is sustained. The surrogate holds that the powers granted in the will did not include the right to invest in the questioned guaranteed mortgage certificates.

In paragraph ninth of the will the trustees were authorized, empowered and directed "to invest the estate given to them in trust hereunder, in bonds, secured by first mortgages upon good, productive, improved and unincumbered real estate, in the Borough of Manhattan, City of New York (said mortgages not to exceed seventy per cent of the actual value of such real estate), or to invest the same or any part thereof in the same securities as Savings Banks are authorized by law to invest, always having paramount regard to the safety of said investments."

The challenged certificates were parts of a mortgage upon property located in New Rochelle, Westchester County. The testator had specifically limited mortgage investments to those on realty in the Borough of Manhattan, New York City. The terms of the will would have per-

mitted investment in guaranteed mortgage certificates on property located in that borough. They could not be extended to mortgages on real estate located elsewhere.

Nor did the alternative clause permitting investments in securities in which "Savings Banks are authorized by law to invest" justify the placement of the trust funds in the certificates. This specific question of interpretation of a direction of that nature was considered by me in Matter of Doblin's Estate, 152 Misc. 406, 273 N. Y. S. 712, and in Matter of Haydock's Estate, 158 Misc. 404, 284 N. Y. S. 931. The terms of the wills in those cases limiting investments to those authorized for savings banks were almost identical with those here involved. In Matter of Doblin's Estate, supra, the surrogate pointed out that guaranteed mortgage certificates were never legal investments for the savings banks of this state. Investments in mortgages for these institutions were limited by the Legislature to whole mortgages only.

The rule has been frequently stated and repeatedly followed that a testamentary fiduciary is strictly held to investments authorized by the will. To escape liability for any departure therefrom the fiduciary must be able to point to a clear authorization, sufficiently broad to cover the particular character of the investment made or sought to be made. Matter of Morris' Estate, 153 Misc. 905, 276 N. Y. S. 254; Matter of Herriman's Estate, 142 Misc. 164, 254 N. Y. S. 158; King v. Talbot, 40 N. Y. 76; Matter of Hall, 164 N. Y. 196, 58 N. E. 11. In making investments of trust funds the trustee is under a duty to the beneficiary to conform to the terms of the trust unless compliance is impossible or illegal or unless there has been such a change of circumstances that compliance would defeat or substantially impair the accomplishment of the purpose of the trust. Restatement of the Law of Trusts, § 227, p. 645. "By the terms of the trust the trustee may be restricted to classes of investments narrower than those in which he would otherwise be permitted to invest. In such a case the trustee commits a breach of trust if he invests in securities not permitted by the terms of the trust although they would otherwise be proper trust investments; and he can be surcharged for any loss that ensues." Scott on Trusts, page 1225; Matter of London's Estate, 104 Misc. 372, 376, 171 N. Y. S. 981, affirmed 187 App. Div. 952, 175 N. Y. S. 910; Matter of Irwin's Estate, 59 Misc. 143, 112 N. Y. S. 205.

Here the grant of authority made by the testator to his trustees was limited to the class of securities defined by him. The challenged guaranteed mortgage certificates were not included within the specified group. Their purchase by the trustees was unauthorized. They are therefore surcharged with the original amount expended for the purchase of these certificates—$5,955. Upon paying that amount into the fund they may withdraw the certificates for their personal use. In the

event that they decide not to pursue such election within thirty days, the certificates are directed to be sold and the difference between their cost and the proceeds of the sale constitutes the net surcharge.

TESTAMENTARY CHARACTER OF INDORSEMENTS OF CERTIFICATES

In re Brown's Estate, Supreme Court of Pennsylvania, 22 Atl. Rep. (2d) 821

Intestate indorsed certain certificates representing accounts in a savings and loan association to herself and "in case of death" to two named sons only. Upon her death, after deducting inheritance tax payments, the association canceled the old certificates and opened new accounts for the sons named. It was held that the intestate's indorsements of the certificates were testamentary in character and not having complied with the statute of wills, the accounts did not pass to the sons but became part of the estate. Even if actual or constructive delivery of securities had been shown, it would not of itself have been sufficient to make a completed gift, since possession by the sons would be entirely consistent with the forms of indorsements under which no part of the funds could be withdrawn by the sons until after the mother's death.

In the matter of the estate of Sarah Brown, deceased, wherein Leo Brown, administrator of the estate of Sarah Brown, deceased, filed a petition for citation directed to the Monaca Federal Savings & Loan Association and Albert E. Brown and Robert E. Brown, for a rule to show cause why investment share certificates and a savings share book or certificate and an automobile should not be turned over to him as the property of the estate. From a decree discharging the rule to show cause, the administrator appeals.

Decree reversed as to Albert E. Brown and Robert E. Brown and record remitted with instructions to reinstate the rule for a citation, and decree affirmed as to the Monaca Federal Savings & Loan Association.

Graham & Dilley, Buchanan & Barrickman, and Charles Barrickman, all of Beaver, for appellant.

Lawrence M. Sebring and D. B. Hartford, both of Beaver, for appellees.

PATTERSON, J.—This is an appeal from a decree of the orphans' court of Beaver County discharging a rule to show cause why certain assets, claimed by the administrator of Sarah Brown, deceased, to have

NOTE—For similar decisions see Banking Law Journal Digest (Fifth Edition) §606.

been the property of the decedent and in her possession at the time of her death, should not be surrendered for administration as part of the estate.

Sarah Brown, the decedent, died intestate on December 25, 1938, leaving to survive her five sons, the oldest of whom, Leo Brown, the appellant, was appointed administrator of her estate on April 19, 1940. Leo Brown, as administrator, on August 19, 1940, filed a petition for a citation, directed to the Monaca Federal Savings and Loan Association and two of his brothers, Albert E. Brown and Robert R. Brown, appellees, for a rule to show cause why two investment share certificates and a savings share book or certificate, issued to "Sarah Brown, in case of death to Robert Brown and Albert Brown, only" and representing accounts, aggregating $14,046.09, with the Monaca Federal Savings and Loan Association, formerly the Phillipsburg Building and Loan Association, should not be turned over to him or, in the event that the certificates could not be delivered, to show cause why their value at decedent's death, with interest and dividends, should not be paid to him as administrator. In addition to the securities, appellant also sought to recover, for the estate, a Dodge sedan automobile, now in possession of Albert E. Brown, the certificate of title to which was in decedent's name at the time of her death.

Prior to reorganization of the Phillipsburg Building and Loan Association, the endorsements on the securities in dispute read simply "Sarah Brown," but upon reorganization and the issuance of new certificates, several months before decedent's death, she told the secretary of the Association she wanted the new certificates "made out in these two names and payable to them only in case of her death," stating as her reason that "the other boys have inherited money from their father and have not taken care of the funds to her satisfaction." The secretary thereupon added the words "in case of death to Robert Brown and Albert Brown, only" and delivered the certificates to decedent, who placed them in a locked box or "toy bureau" in her home, used by her as a depository for her valuable and legal papers, where they remained until her death. Subsequent to the issuance of the new shares and up until her death, all dividends were paid to decedent, as before, and from time to time during this period she made withdrawals which, as the court below found, totalled $1,500. The securities and certificate of title to the automobile were found, after decedent's death, in the box where she kept her valuable papers, by the son Albert, who had obtained possession of the key to the box about six weeks before decedent's death, from a granddaughter to whom decedent gave the key, before leaving for a hospital in Cleveland, Ohio, where she underwent an operation and remained until shortly before her death, with instructions to give the key to him. In the interim between decedent's death and the grant

of letters to appellant, the Association cancelled the old certificates, upon their presentation to it by Robert R. Brown, and, after deducting inheritance tax payments, opened two new savings share accounts, one for Albert E. Brown and one for Robert R. Brown, in the sum of $6,995.79 each.

An answer was filed by appellee Albert E. Brown, claiming the automobile as a gift from his mother, during her lifetime, and at the same time all of the appellees filed answers, averring that upon the death of decedent the investment share accounts and savings share account became the absolute property of Albert E. Brown and Robert R. Brown, by virtue of the terms of the endorsements thereon. After hearing and argument before the court en banc, at which time appellees questioned the jurisdiction of the orphans' court to grant the relief prayed for, the court below held that it did have jurisdiction, but discharged the rule, holding, as to the securities, that "the writing on the certificates and book was not testamentary; nor did it create a trust; but evidenced a gift inter vivos, reserving to the donor the income, with a possible right of consumption of the principal, but whatever was left at the time of her death belonged to the two boys," and as to the automobile, that under the evidence title to it had passed to Albert E. Brown, by way of gift, during the lifetime of the decedent.

While the orphans' court possesses extensive powers to assist a decedent's personal representative to acquire control of property rightfully belonging to the estate, its jurisdiction being entirely of statutory origin, these powers may be invoked only within well-defined ultimate limits, one of which is that the orphans' court cannot determine the validity of a disputed debt to an estate. See McGovern's Estate, 322 Pa. 379, 186 A. 89. The appellee Association is not in the position of a mere stakeholder in this controversy, but in that of a debtor to the decedent who has already paid over the funds standing to the decedent's credit, under a claim of right, and the legality of its action in so doing presents a controversy for the common pleas to settle. Under similar circumstances, it was said in Appeal of the Harrisburg National Bank, 84 Pa. 380, 384, 385: "It may be very clear that under the laws of Pennsylvania this fund belongs to the administrator. If so, it is simply a debt due to the estate. . . . In the settlement of the administrator's account, [the orphans' court] certainly could decide that this was an asset of the estate which the administrator ought to have collected, and if he had negligenly lost it, could surcharge him with the amount. But surely they could not cite the debtor and enter a decree or judgment against him. That would be to draw into that court the trial and determination of all claims by decedents' estates against third persons." See also McGovern's Estate, supra; Hober's Estate, 118 Pa. Super. 209, 180 A. 140; Smith's Estate, 141 Pa. Super. 571, 15 A. 2d 523. In so far as

the petition sought an order on the appellee Association to pay over any of its funds to appellant, it should have been dismissed for want of jurisdiction.

Whether the court below properly assumed jurisdiction over the dispute between appellant and the other appellees, involving specific property which appellant claims as part of the decedent's estate, depends upon different considerations. "If the property was in decedent's possession, either actually or presumptively, at the time of his death, or thereafter at any time came into the possession of his personal representative as part of the estate for purposes of administration and distribution, the jurisdiction of the orphans' court attaches, at least preliminarily. . . . If the property is fairly to be regarded as having been in decedent's possession, either actually or presumptively, at the time of his death, but there is a substantial factual dispute as to ownership, the orphans' court has no power, sitting a a fact-finding tribunal, to determine this question, but may submit the issue for a trial by jury, and a verdict so found will properly constitute the basis of a decree by that court settling the controversy." Crisswell's Estate, 334 Pa. 266, 269, 270, 5 A. 2d 577, 579. See also Keyser's Estate, 329 Pa. 514, 518, 519, 198 A. 125; Moyer's Estate, 341 Pa. 402, 406, 407, 19 A. 2d 467. "If the proofs ' "show that the denial of the plaintiff's right is not based upon facts which in law show a substantial dispute," so, that, if the case were before a jury, binding instructions against the defendant would be justified, then the court may administer the relief asked, and it is not necessary that the right of the plaintiff should be first settled at law, or that an issue should be granted to determine the question of the title set up by thedefendant.' . . . 'It has long been held that an issue will not be awarded unless evidence is produced raising a controlling disputable question of fact.' " Estate of Eliza Gallagher, 109 Pa. Super. 304, 307, 308, 167 A. 476, 477. See also Weller's Estate, 247 Pa. 196, 204, 93 A. 331; Walkinshaw's Estate, 275 Pa. 121, 125, 118 A. 766. Guided by these principles, we conclude that the orphans' court had jurisdiction to entertain the petition with respect to appellees Albert E. Brown and Robert R. Brown and that the question whether, under the circumstances, a substantial dispute was presented, as to the ownership of the specific property claimed by appellant, was one to be decided by it, in limine; further, that the denial by these appellees of appellant's right to the property claimed is not supported by evidence sufficient to show a "substantial dispute," as the court below should have declared as a matter of law, granting the relief prayed for as to them.

It is, of course, well settled that the mere fact that the donor of a fund reserves the interest or income therefrom during his lifetime, thereby postponing enjoyment by the donee until his death, will not, of

itself, defeat an intended gift inter vivos of the fund, if the donor shall have immediately transferred to the intended donee all control and dominion over the principal of the fund, as by assignment or unconditional delivery of the written evidence thereof. See Funston v. Twining, 202 Pa. 88, 51 A. 736; Packer v. Clemson, 269 Pa. 1, 112 A. 107; Connell's Estate, 282 Pa. 555, 128 A. 503, 38 A. L. R. 1362; Chapple's Estate, 332 Pa. 168, 2 A. 2d 719, 121 A. L. R. 422; Pyewell's Estate, 334 Pa. 154, 5 A. 2d 123. Being of opinion that the endorsement of the words "in case of death to Robert Brown and Albert Brown only" upon the certificates and savings share book constituted such a transfer, the court below concluded that there had been a valid gift of the principal of the funds represented thereby to the sons, Robert and Albert, perfected by the decedent in her lifetime. On this appeal, appellees take the position that "it is more right to say that the right of the two sons is fixed as third party beneficiaries to a contract between the decedent and the Association, than it is to test the transaction on the theory of a gift of personal property," or that "what was given by these instruments was an estate in remainder to the two sons, just as much so as if the mother had drawn a deed to real estate in their favor," or that "in effect the Association was a trustee under an express trust, and obliged to pay the residue to the two sons," relying largely upon Smith's Estate, 141 Pa. Super. 571, 15 A. 2d 523, cited supra. Adams' Estate, 139 Pa. Super. 512, 12 A. 2d 465, and Sherman v. Stoner, 78 Pa. Super. 189, are also cited as supporting these contentions. The writing in Smith's Estate consisted of an agreement, under seal, executed by the decedent and appellee, on the reverse side of the signature card for a savings account owned by decedent in a trust company, which created a joint tenancy with right of survivorship, and the writings involved in Adams' Estate and Sherman v. Stoner consisted of declarations by the donor affirming that a gift had already been consummated in the past, which were held to be evidence of an absolute gift, implying that delivery and every other formality necessary to create a gift had taken place. The writings involved in these cases are manifestly in no way comparable to the endorsements here involved. In our opinion, the directions "in case of death to Robert Brown and Albert Brown," like the writings involved in Grady v. Sheehan, 256 Pa. 377, 100 A. 950, and Waltman v. Germantown Trust Co., 92 Pa. Super. 480, are purely testamentary in character, as the decedent's stated purpose at the time the certificates were so endorsed, her subsequent retention of the certificates, and her exercise of control and dominion over the funds up until her death, clearly indicate they were intended to be. See also Hicks v. Meadows, 193 Ala. 246, 69 So. 432; McCullough v. Forrest, 84 N. J. Eq. 101, 92 A. 595; Dover Co-operative Bank v. Tobin's Estate, 86 N. H. 209, 166 A. 247; Turpin's Adm'r v. Stringer, 228 Ky. 32, 14 S. W. 2d 189; Helper

State Bank v. Crus, 90 Utah 207, 61 P. 2d 318; Bailey v. New Bedford Institution for Savings, 192 Mass. 564, 78 N. E. 648, 116 Am. St. Rep. 270; Jones v. Grisp, 109 Md. 30, 71 A. 515; McCormack v. Bertschinger, 115 Or. 250, 237 P. 363. As testamentary dispositions, the endorsements are concededly ineffectual, because not in compliance with our statute of wills, 20 P. S. § 181 et seq.

The mere fact of possession by the son, Albert E. Brown, of the key to the box in which the securities were kept by decedent, for a period of six weeks prior to decedent's death, is of no legal significance under the circumstances here presented, as appellees apparently concede, for they state that "nothing counts in this case but the written instruments." It is true that, where manual delivery is imparticable or inconvenient, delivery of the key to a receptacle, with a clear and unmistakable intent to make a gift, may be sufficient to establish a constructive or symbolical delivery of the property to which the key gives access. Elliott's Estate, 312 Pa. 493, 500, 167 A. 289, 90 A. L. R. 360; Crisswell's Estate, supra, 334 Pa. at pages 270, 271, 5 A. 2d 577. But, in the present case, it does not appear that manual delivery would have been either impracticable or inconvenient, and there is a complete absence of proof that the key was delivered for the purpose of making a constructive delivery of any of the property to which the key gave access. All that the evidence shows is that the decedent, just prior to leaving for the hospital, handed the key to a third party with instructions to give it to the son, without any words of explanation whatever as to her purpose in so doing. It does not appear that decedent was aware of the imminency of death at the time and, under the circumstances, it is almost inconceivable that she could have intended by this mere direction to strip herself of practically all of her available property. It may be, and probably was, decedent's intention to bestow mere custody of the key upon the son, during her absence at the hospital, and this possibility not being negatived by the evidence, no constructive or symbolical delivery has been sufficiently shown. See Elliott's Estate, supra, 312 Pa. at page 500, 167 A. 289, 90 A. L. R. 360. Moreover, even if a delivery, actual or constructive, of the securities had been shown, this would not, of itself, have been sufficient to make a completed gift of the funds, under the circumstances of this case, since possession by the sons would be entirely consistent with the form of the endorsements, under which no part of the funds could be withdrawn by them, or either of them, until after the decedent's death. See Jones v. Crisp, supra, 71 A. 515, 517.

The omission on the part of appellee Albert E. Brown to obtain a certificate of title, issued in his own name, would subject him to the penalty imposed by section 201 of the Vehicle Code of May 1, 1929, P. L. 905, 75 P. S. § 31, but such omission would not, of itself, defeat an otherwise valid gift to him of the Dodge sedan automobile by the

mother, during her lifetime. See Braham & Co. v. Steinard-Hannon Motor Co., 97 Pa. Super. 19; Automobile Banking Corp. v. Atlas A. Fin. Corp., 129 Pa. Super. 501, 509, 195 A. 441. And compare Connell's Estate, supra, 282 Pa. at pages 560-562, 128 A. 503, 38 A. L. R. 1362. However we are of opinion that the evidence relied upon by the son, in support of his averment of a gift inter vivos of the automobile, is insufficient to overcome the presumption of ownership in the decedent, arising by reason of the taking of title in her name and her retention of possession thereof, among her valuable papers, down to the time of her death. The evidence of statements by decedent of an intention to make a gift to the son at some future time is clearly insufficient, as is also the evidence that she executed the assignment on the back of the certificate of title, apparently in blank, in the absence of an unequivocal delivery to him of the certificate, during her lifetime. "To make a valid gift there must have been not only an intention to make it but to do so at the time and not in the future, and it must be accompanied by an actual or constructive delivery to the donee by which the donor released all dominion over the property and invested the donee with full title to and control over the same. Without a complete delivery there can be no valid gift inter vivos, though every step be taken that is essential to the validity of the gift; if there is no delivery the gift must fail. Intention cannot supply it; words cannot supply it; actions cannot supply it; it is an indispensable requisite without which the gift fails, regardless of consequences, and the test of delivery is the change of property, the immediate right to the entire dominion over the subject of the gift, a perfect title which is as good against the donor as anyone else." Hafer v. McKelvey, 23 Pa. Super. 202, 204. See also Reese v. Philadelphia Trust, etc., Co., 218 Pa. 150, 156, 67 A. 124, 120 Am. St. Rep. 880; Chapple's Estate, supra, 332 Pa. at page 170, 2 A. 2d 719, 121 A. L. R. 422. That the son was permitted to possess and use the automobile for his own purposes is likewise of no significance as showing an executed gift inter vivos, particularly since he lived with and was supported by the decedent, up to the time of her death. "The mere possession of the property is not sufficient evidence of a gift, for this may be consistent with a mere custody or agency. The evidence must show that the donor intended to divest himself of the property, and should be inconsistent with any other purpose." Reading Trust Co. v. Thompson, 254 Pa. 333, 337, 98 A. 953, 955. See also Maxler v. Hawk, 233 Pa. 316, 324, 82 A. 251, Ann. Cas. 1913B, 559; Campbell's Estate, 274 Pa. 546, 550, 118 A. 547; Henes v. McGovern, 317 Pa. 302, 307-309, 176 A. 503.

Whether the circumstances relied upon to establish a gift of the automobile be viewed individually or collectively, we are of opinion that they show, at most, a possible intention to make a gift which was never

consummated by delivery during the decedent's lifetime. And, in arriving at this conclusion, we are not unmindful that less evidence may be required to establish a gift where the relationship of parent and child exists than where the transaction is between strangers. See Gongaware's Estate, 265 Pa. 512, 516, 109 A. 276; Yeager's Estate, 273 Pa. 359, 362, 117 A. 67; Henes v. McGovern, supra 317 Pa. at page 308, 176 A. 503. What has already been said with respect to the sufficiency of the evidence to establish a constructive delivery of the securities applies of course, with equal force, to the certificate of title to the automobile.

The decree is reversed as to appellees Albert E. Brown and Robert R. Brown and the record is remitted with instructions to reinstate the rule for a citation and to make a decree granting the relief prayed for as to them; as to the appellee Savings and Loan Association the decree is affirmed for the reasons stated in this opinion. Costs to be paid one-half out of the estate and one-half by appellees Albert E. Brown and Robert R. Brown.

PRESUMPTION OF CONTINUANCE OF OWNERSHIP OF NOTE

Landis v. Landis, Supreme Court of Pennsylvania, 22 Atl. Rep. (2d) 908

The ownership of a note, payable on its face to decedent, in the absence of indorsement during his lifetime, is presumed to have continued in decedent to the time of his death and thereupon to have passed to his estate.

Bill in equity by Anna Mary Landis against D. Allen Landis and Harry H. Landis, Jr., to establish and enforce an alleged oral trust in a $15,000 promissory note payable to plaintiff's deceased father and in the possession of first named defendant, a coexecutor of decedent's estate. From a decree of dismissal, entered after objections to court's jurisdiction over subject matter of controversy were sustained, plaintiff appeals.

Decree affirmed.

H. Clay Burkholder and A. W. Brubaker, both of Lancaster, for appellant.

Paul A. Mueller, of Lancaster, for appellees.

PER CURIAM.—Harry H. Landis, Sr., died on June 1, 1934, domiciled in Lancaster county, leaving to survive him, in addition to his

NOTE—For similar decisions see Banking Law Journal Digest (Fifth Edition) §628.

widow, two sons, D. Allen Landis and Harry H. Landis, Jr., whom he appointed executors of his estate, and a daughter, Anna Mary Landis. On December 20, 1939, Anna Mary Landis filed this bill in equity against the sons, in their individual capacity, to establish and enforce an alleged oral trust in a $15,000 promissory note which was given to the decedent, payable to him on demand, by Harry H. Landis, Jr., on March 9, 1933, and is now in the possession of D. Allen Landis, unendorsed, averring that the decedent, "in order to equalize gifts and advancements which he had made to his two sons and losses which he had sustained by reason of assistance rendered to his two sons," had delivered the note to D. Allen Landis subject to an oral trust for her, the daughter's maintenance and support. Preliminary objections filed by Harry H. Landis, Jr., denying the jurisdiction of the court of common pleas over the subject matter of the controversy were sustained, after argument, and a decree was entered in effect dismissing the bill wihout prejudice to petitioner's right to present a petition to the orphans' court for allowance of her claim. From that decree she has taken this appeal.

The appeal cannot be sustained. As the note in controversy is payable, on its face, to the decedent, it is presumed, in the absence of endorsement by him during his lifetime, that ownership continued in him up to the time of his death. See Paxson's Estate, 225 Pa. 204, 210, 73 A. 1114; Keyser's Estate, 329 Pa. 514, 521, 198 A. 125; Annotation 30 A. L. R. 1492. Title being prima facie in the estate, which is now being administered in the orphans' court, it is exclusively for that court to determine, in limine, whether's appellant's assertions are supported by evidence which in law shows a substantial dispute as to ownership of the asset, and the court of common pleas is without jurisdiction to entertain the cause until and unless the orphans' court, having first determined that question in appellant's favor, shall have submitted to it for trial the issue of title. See Keyser's Estate, supra; Crisswell's Estate, 334 Pa. 266, 271, 5 A. 2d 577. Appellant cannot short circuit the case into the common pleas by merely pleading facts which, if properly proven, may establish her title. Crisswell's Estate, supra, 334 Pa. 271, 5 A. 2d 577.

BOOK REVIEWS

Handbook on Bankruptcy, by A. Lincoln Lavine, of the New York Bar. 276 pages. Published by Professional Publications. Inc., Woolworth Building, New York City. Price $2.75.

Since the enactment of the Chandler Law, otherwise known as the new National Bankruptcy Act, there has been a need for a concise and understandable work that law practitioners, credit executives and bankers could have available for reference. This book fills that requirement. The new law goes far beyond the popular concept of bankruptcy as a means of liquidating and closing an insolvent business. There are broad and flexible provisions for enabling a business in trouble to carry on, under the portions dealing with Corporate Reorganization and Arrangements. These open up to the general practitioner a field of practice which has heretofore been largely restricted to specialists in bankruptcy law. The Handbook offers a dependable guide in working out problems of this character.

"Handbook on Bankruptcy" explains each provision of the law in brief, clear style that everyone can understand and apply. In addition, it is intelligently and fully indexed and cross indexed. Also, it contains as a supplement, all of the Official Forms and General Orders developed by the United States Supreme Court for use in matters coming under the law.

Credit Manual of Commercial Laws—1942 Edition, 848 pages—$6.50. Published by the National Association of Credit Men, One Park Avenue, New York, N. Y.

This is the 34th annual edition of what many business executives consider an almost indispensable hand-book on the laws of business. During the past year the legislatures in 44 states held sessions and enacted new laws and revised old statutes affecting trade, especially the business transactions of manufacturers and wholesalers. These law changes have all been checked and are included in the 1942 edition of Credit Manual of Commercial Laws.

This new edition of Credit Manual is divided into seven parts. The first is headed, "Making the Sale," and deals with such subjects as Contracts, Statute of Fraud, Corporations, Partnerships, Agency, Contractual Rights of Married Women, Law of Sales Export Sales and Credits. Sales and Use Taxes and Fair Trade Laws in the various states.

Part two covers the general subject of Secured Sales, such as Conditional Sales, Chattel Mortgages, Bailments, Consignments and Trust Receipts.

Part three takes up the problems found in "Collecting the Account." Part four is devoted to Insolvency. Part five takes up "Credit Protection on Public Work Projects." An extensive section, Part six, gives a general outline of the new Federal Regulations on National Defense.

Credit Manual of Commercial Laws was first issued 34 years ago by the National Association of Credit Men to give its members a quick reference book on the principal laws of trade. It had been found that no one book gave satisfactory information on these important subjects so the Association of Credit Men set out to assemble the information for its members. The new edition, the 34th, contains 848 pages crammed with vital information.

Judicial Trends

Digest of Decisions on Valid Gift or Trust Through Medium of Trust Deposit

Where the presumption from a deposit "A in trust for B" was not rebutted by any testimony, and where first B, then A, died, payment of the deposit thereafter by the bank to the administrator of B was rightful, the trust being irrevocable and not lapsing because of the death of B before A. Bishop v. Seamen's Bank for Savings, 33 N. Y. App. Div. 181. 17 B. L. J. 435.

A deposit by A in trust for B unexplained by other evidence, is sufficient to create a trust in favor of B, and after A's death, B is held entitled to the deposit as against the administrator of A. Martin v. Funk, 75 N. Y. 134. 17 B. L. J. 430.

A deposited money in the name of "A, trustee for B." B was A's stepdaughter. A handed her the book, and she thanked him for the present. A regained possession of the book and made subsequent deposits; he made one withdrawal of interest, but afterwards deposited more than he withdrew. Upon A's death, B sued A's administrator for the deposit. Held: A trust was completely constituted in B's favor, entitling her to the money. Ray v. Simmons, 11 R. I. 266. 17 B. L. J. 899.

A deposited money in the name of "A trustee for B." Upon his death it was held that A's making the deposit in this form created a prima facie trust in B's favor. Upon the face of the bank book the money belonged to B, and there was not sufficient evidence in the case to rebut this presumption. Estate of Hugh Gaffney, 146 Pa. St. 49. 17 B. L. J. 740; 18 B. L. J. 76.

A deposited money as "trustee for B," retaining the bank book and telling B, "I put that money for you in the bank, it is yours." Held, A's statement constituted a perfect gift to B, assented to by the latter, and upon A's death, B was entitled to the money as against the administrator of A. Alger v. North End Sav. Bank, 146 Mass. 418. 17 B. L. J. 485.

A deposited $3,000 in a savings bank in the name of "A, in trust for B." A retained the pass book until his death, and B was never informed nor had any knowledge of the deposit until after A's death. During his life A drew out $2,000 of the deposit. After his death, his administrator delivered the book to B. This action is by B against the administrator of A to recover the $2,000 drawn out by A, with interest. Held: Under the facts, an irrevocable trust in the entire deposit was created in favor of B, at the time such deposit was made, and he was entitled to judgment for the amount claimed. Robertson v. McCarthy, 54 N. Y. App. Div. 103, 66 N. Y. Supp. 327. 17 B. L. J. 923.

Where a man deposits money in a savings bank in his name, in trust for his wife, upon his death the deposit belongs to her and not to his estate, even though he made the deposit in this form at the suggestion of an officer of the bank because he had already deposited in his own name as much as the law permitted. In re Beaman's Estate, N. Y., 163 N. Y. Supp. 800. 34 B. L. J. 428.

A opened an account entitled "A, in trust for B." The pass book was delivered to B, who retained it for nearly a year and then returned it to A. A later changed the account to his individual name, and it remained in this condition until A's death. It was held that there was an irrevocable trust in favor of B, and that he was entitled to recover the fund. Matthews v. Brooklyn Savings Bank, 136 N. Y. Supp. 110. 29 B. L. J. 839.

The defendant made a deposit in his own name, writing the word "Trustee" after his name on the deposit slip. It was held that this, together with evidence as to conversations between the defendant and his two nephews, concerning his intention to educate them, was insufficient to establish a gift of the deposit in favor of the nephews. Mount v. Krilich, Wash., 230 Pac. Rep. 828. 42 B. L. J. 213.

Where a woman deposits money in a savings bank in her name, in trust for her husband, she retaining possession of the pass book, she will be entitled to the fund on the death of her husband. The fact that the husband's executor, subsequent to the husband's death, obtains possession of the pass book, is immaterial. In re Collins' Estate, 249 N. Y. Supp. 291. 48 B. L. J. 728.

Where a deposit was made in the depositor's name in trust for her granddaughter and the pass book was delivered to the granddaughter, it was held, upon the depositor's death, that an irrevocable trust had been created. This was true although it appeared that the trust was subject to the limitation that the depositor was to use as much of the deposit as she desired and that the granddaughter later returned the pass book to the depositor so that she might withdraw funds for her support dur-

ing her illness. Hanigan v. Wright, 251 N. Y. Supp. 651. 49 B. L. J. 158.

Where a person deposits money in a savings account in his name and at the same time signs a declaration to the effect that he holds the deposit in trust for some one else, the beneficiary will be entitled to the fund upon the death of the depositor. This is so even though the beneficiary was not informed of the deposit. In such a case, if the beneficiary dies before the depositor, the heir or heirs of the beneficiary will be entitled to the fund upon the depositor's death. Sherman v. Hibernia Savings & Loan Association, Cal., 20 Pac. Rep. (2d) 138. 50 B. L. J. 885.

Where a person deposits money in a savings account in his name in trust for another and makes a will bequeathing the deposit to the beneficiary, upon the depositor's death, the beneficiary takes title to the deposit by virtue of the form in which it was made and not under the will. In re Rosso's Estate, 262 N. Y. Supp. 861. 50 B. L. J. 741.

Where a woman deposits money in a savings account in her name "in trust for" her husband and delivers the pass book to him saying, "Here, this is yours, take it," a "dry" or inactive trust is created and the husband is entitled to the deposit upon the wife's death as against the executor of the wife's will. In fact, in such circumstances, the husband can compel the payment of the deposit to him, as beneficiary of the trust, at any time after the opening of the account. Long Branch Banking Co. v. Winter, N. J., 163 Atl. Rep. 903. 50 B. L. J. 434.

A woman opened a savings account in her name "in trust for" her daughter, telling her daughter about the deposit a few months later. Subsequently she took the daughter to the bank with her several times upon the occasion of making new deposits in the account and told the daughter that the deposit would be hers after the depositor's death. It was held that a valid trust in favor of the daughter had been created and that, upon the depositor's death, the daughter was entitled to the deposits as against the executor of the depositor's will. Buteau v. Lavalle, Mass., 187 N. E. Rep. 628. 51 B. L. J. 232.

A woman deposited money in a bank in trust for her son, telling him that she had put the money in the bank for him. Upon her death, it was held that it constituted a valid trust and that the son was entitled to the money. Slepkow v. McSoley, R. I., 172 Atl. Rep. 328. 51 B. L. J. 722.

A man about seventy-five years of age, having a deposit in his name amounting to $32,900, went to the bank with his five children and transferred the deposit to new trust accounts in the name of his different

children. Each account was entitled in the following form: "Peter Bollack in trust for himself and (child), joint owners, subject to the order of Peter Bollack, balance at the death of either to belong to the survivor." It was held that each account created a revocable trust in favor of the child named and that, in the absence of evidence indicating that the depositor did not intend to create a trust, the children were entitled to the deposits upon the death of the depositor. Bollack v. Bollack, Md., 182 Atl. Rep. 317. 53 B. L. J. 255.

Where a man deposits money in a savings bank in his name in trust for his daughter and the evidence indicates an intention to create an irrevocable trust in her favor, she will be entitled to the fund even during the lifetime of the depositor. Mucha v. Jackson, N. J., 182 Atl. Rep. 827. 53 B. L. J. 340.

The plaintiff's husband gave a sum of money to one Walsh requesting that Walsh take care of it for the plaintiff. Walsh deposited the money in the defendant bank in his name as trustee. It was held that this constituted a valid gift in favor of the plaintiff and that the bank could not apply the deposit to the satisfaction of a debt owing to it by the plaintiff's husband. Whelan v. First Mechanics National Bank, N. J., 192 Atl. Rep. 369. 54 B. L. J. 659.

LEGAL QUERIES AND ANSWERS

By JOSEPH A. NOBILE *of the Massachusetts Bar*

Agent's Authority to Indorse

Q. An employee was authorized to deposit checks payable to his employer, indorsing them with a rubber stamp reading "for deposit," etc. He indorsed a number of the checks with the stamp and the bank paid them. The employee appropriated the proceeds. Is the bank liable to the employer?

A. Yes. It was held that the bank was liable for the amount to the employer. The form of the indorsement should put the bank upon notice as to the agent's authority. Rivers v. Liberty National Bank, S. C., 133 S. E. Rep. 210. 44 B. L. J. 92. § 57 B. L. J. Digest.

Alteration

Q. The words, "This note is to fulfill a contract dated June 15, 1940" were written on the margin of a note. Does the erasure of such words constitute a material alteration?

A. It has been held that such erasure is not a material alteration. Meson v. Shaffer, W. Va., 96 S. E. Rep. 1024.

Authority to Certify Checks

Q. An assistant cashier certified a check drawn on his bank. He had not been authorized specially to represent the bank in such matters. Is his certification binding on the bank?

A. No. An assistant cashier has no authority to certify checks unless the same is expressly conferred upon him. Pope v. Bank of Albion, 57 N. Y. 126. 30 B. L. J. 669, 37 B. L. J. 750. § 247 B. L. J. Digest.

Bank Stock

Q. Can a national bank stock assessment be collected from a stockholder's estate?

A. Yes. A national bank stock assessment claim against the estate of a decedent is an unsecured and unpreferred claim and becomes payable only as of the date of the assessment and is collectible from a deceased's estate only in the same manner and to the same extent as other claims of like character. Hart v. Burke, 108 Fed. Rep. (2d) 82. 57 B. L. J. 231. § 145 B. L. J. Digest.

Certification of Stale Check

Q. Is a bank justified in certifying a depositor's check three months after its issuance in the absence of evidence of collusion or bad faith?

A. Yes. Freeport Bank v. Viemeister, 238 N. Y. Supp. 169.

Certified Check

Q. The bona fide holder of a check, on which the payee's indorsement is a forgery, had it certified by the drawee bank. The bank paid the check and then discovered the forgery. What are the bank's rights against the holder of the check?

A. It can recover from the holder money paid to him. The certification does not admit the genuineness of the indorsements. First National Bank v. Northwestern National Bank, 152 Ill. 296, 38 N. E. Rep. 739. 32 B. L. J. 152, 37 B. L. J. 749, 39 B. L. J. 76. § 269 B. L. J. Digest.

Delivery

Q. Where a check is delivered to the payee conditionally and the payee transfers it in violations of the condition what must the holder do in order to recover?

A. He must show that he acquired the check as a holder in due course. Silverman v. Gates Ave. Association, Inc., 211 N. Y. Supp. 491. 42 B. L. J. 846. § 386 B. L. J Digest.

Duties of Bank Director

Q. A bank director purchased stock of his bank, giving notes in payment thereof. In an action brought by the bank on the notes, can the director defend on the ground that the value of the stock had been misrepresented to him by the president of the bank?

A. No. It was the duty of the director to know the financial condition of the bank. Therefore, the misrepresentation by the president was not a defense. Goess v. Ehret, 85 Fed. Rep. (2d) 109. 53 B. L. J. 836, 859. § 1110 B. L. J. Digest.

Implied Authority of Agent

Q. May an agent have implied authority to sign checks in the name of his principal?

A. Yes. Woods-Taylor & Co. v. Smith, Tex., 288 S. W. Rep. 1090.

Indorsement and Transfer

Q. Can an instrument be transferred after maturity?

A. Yes, but the indorsee takes only such rights in the instrument as his indorser had. He is not a holder in due course.

Negotiability

Q. Is the negotiability of a promissory note affected by the fact that it is indorsed without recourse?

A. No. Commercial Credit Co. v. Ward & Son Auto Co., Ala., 109 So. Rep. 576. 43 B. L. J. 863. § 936 B. L. J. Digest.

Q. Does the fact that a promissory note bears a seal affect its negotiability?

A. No. N. I. L., Sec. 6.

Payment

Q. Where a person deposits funds in a bank for the purpose of paying a particular outstanding check, will the bank be permitted to apply the deposit to the payment of a note of the depositor which it holds?

A. No. The bank must pay the money in accordance with the terms of the deposit. Joy v. Grasse, Minn., 217 N. W. Rep. 365, 45 B. L. J. 281; First Nat. Bank v. Barger, Ky., 115 S. W. Rep. 726. 32 B. L. J. 597. § 1256 B. L. J. Digest.

Presentment for Acceptance

Q. A bill of exchange drawn on a merchant is payable at a bank. Is presentment for acceptance necessary?

A. Yes. Where a bill is payable elsewhere than at the residence or place of business of the drawee, presentment for acceptance is required. N. I. L., Sec. 143.

Several Checks Presented at One Time

Q. Where a number of checks are presented to the drawee bank at the same time through the clearing house and the bank's funds are insufficient to pay all, should it pay any of the checks?

A. No. Louisville & N. R. Co. v. Federal Reserve Bank, Tenn., S. W. Rep. (2d) 683, 46 B. L. J. 300. § 1138 B. L. J. Digest.

Stopping Payment of Cashier's Check

Q. At the request of a depositor, a bank issued a cashier's check payable to a third person, charging the same to the depositor's account. Has the depositor the right to stop payment of this check?

A. In such case, the bank incurs a direct obligation to the payee and the depositor has no right to stop payment. Bobrick v. Second National Bank, 162 N. Y. Supp. 147. 34 B. L. J. 116. § 1470 B. L. J. Digest.

Insanity of Drawer of Check

Q. Does the insanity of a depositor revoke the authority of the bank to pay his check?

A. Yes. But payment of the genuine check of an insane person without notice of the insanity will generally be held a valid payment. Riley v. Bank, 36 Hun (N. Y.) 513. 23 B. L. J. 956, 32 B. L. J. 525. § 287 B. L. J. Digest.

Presentment for Payment

Q. Can presentment for payment be waived by a drawer or indorser?

A. Yes. The waiver may be expressed or it may be implied from some action or words of the drawer or indorser. N. I. L., Sec. 82.

Q. Is presentment for payment necessary to charge the maker of a note or the acceptor of a bill with liability?

A. No. They are liable without presentment. N. I. L., Sec. 70.

Recital of Consideration

Q. Is a check rendered non-negotiable by the following memorandum on the back: "The original indorser certifies that he is the owner of the commodity for which this check is given and has full authority to sell same"?

A. No. P. J. Williams Industries v. First State Bank, Texas, 38 S. W. Rep. (2d) 1109, 48 B. L. J. 776. § 936 B. L. J. Digest.

Signature by Agent

Q. Is an agent personally liable on a check signed "A, Agent"?

A. Yes. The proper method of signature is to write the principal's name, followed by A's name as agent. Bickford v. First National Bank, 42 Ill. 238. 37 B. L. J. 748. § 1371 B. L. J. Digest.

Sufficient Consideration

Q. The maker of a note delivered it to the payee in payment of a claim against the makers' son. Can the payee hold the maker on the note?

A. Yes. A note or bill given in payment of a debt due from a third person to the payee is supported by a sufficient consideration and will bind the maker. Crombie v. McGrath, 139 Mass. 550. 37 B. L. J. 350. § 345 B. L. J. Digest.